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CALIFORNIA JURISPRUDENCE

A COMPLETE STATEMENT OF THE LAW AND PRACTICE OF THE STATE OF CALIFORNIA

Editor

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VOLUME II

ANIMALS TO APPEAL AND ERROR

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CALIFORNIA JURISPRUDENCE

VOLUME II

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I. INTRODUCTORY.

§ 1. Scope of Article and Survey of Subject.—This article treats of the law as applied to man's relation to, use of and exercise of ownership over animals. It includes a treatment of animals, wild or domestic, as the subject of property, the regulation of the ownership and the business of raising them, and the incidents and liabil-

ities flowing from the ownership and bailment. The liability of an owner for injuries to persons or other animals and for trespasses of animals owned by him is treated, and as an incident to the latter, the duty of keeping and maintaining fences is discussed, though the general subject of fences is elsewhere treated.[1] This article treats also of the civil liability, other than that of carriers, railroads, and street railways,[2] for injuries to animals, as well as the criminal liability for the infliction of injuries to and cruelty to animals. While a contract of agistment is distinguished from a lease,[3] the rights of the parties under a lease are reserved for another article.[4] Other related subjects not directly discussed include the following: fish and fisheries,[5] game laws,[6] livery-stable keepers,[7] veterinary surgeons,[8] the sale[9] and mortgaging of animals,[10] larceny of animals,[11] situs of animals for taxation,[12] to what extent animals are exempt from execution,[13] injuries to animals on highways,[14] bounties,[15] health regulation concerning the keeping of animals in cities,[16] life, health and accident insurance on livestock,[17] and the prevention of combinations to obstruct the sale of livestock in the state.[18]

The law of California as applied to the subject of animals is in substantial accord with that of other states, and of the common law, except in regard to the subject of trespassing animals. As to this branch of the subject, California law, while repugnant to that rule of the common law requiring an owner of cattle to prevent their

1. See FENCES.
2. See CARRIERS; RAILROADS; STREET RAILWAYS.
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trespassing on land of his neighbor, is the same as that prevailing in other states where the business of raising and grazing of cattle is pursued on a large scale. The great difficulty with reference to this subject arises from the fact that when portions of the state changed from a grazing to an agricultural section, the legislature passed numerous special acts in effect reviving the common-law rule. There are scores of such statutes and as many as three were passed at the same session of the legislature relating to the same county or portions of counties. Many of these statutes are still in force, and they govern the rights of the parties in counties covered. With reference to other counties, the common law was in effect restored in all except six by the Estray Act of 1915, but in 1919, the counties were given the privilege of returning to the former rule by a vote of the people at an election had for that purpose.[18a]

§ 2. **Definition and Classification.**—The term "animal" is used in contradistinction to man, and includes inferior irrational sentient beings, possessed of the power of voluntary motion or self-motion.[19] The Penal Code defines the word "animal" as used in the provisions prohibiting cruelty to animals, as including every dumb creature.[20] Animals in general are divided into two classes, domestic or domitae naturae, and wild or ferae naturae. Domestic animals are those which are naturally tame and gentle, or which by long-continued association with man have become thoroughly domesticated and are now reduced to such a state of subjection to his will that they no longer possess the disposition or inclination to escape. Wild animals are such as are of a wild nature or disposition and so require to be reclaimed and made tame by art, industry or education, or else must be kept in confinement to be brought within the immediate power of the owner.[21] The term "animals wild by nature," as used in the Civil

18a. See infra, §§ 20–24.
19. 1 Ruling Case Law, p. 1061.
20. Pen. Code, § 599b.
21. 1 Ruling Case Law, p. 1061.

Code relating to such animals, includes, among others, game birds,[22] wild goats,[23] and fish.[24]

II. OWNERSHIP.

§ 3. Domestic and Wild Animals Generally.—The ownership of domestic animals may be as absolute as that over any other valuable chattel. The code places them in the same category in this respect as chattels, since it provides that there may be ownership of all inanimate things which are capable of appropriation or of manual delivery, and of all domestic animals.[25] And it may be remarked that there is a statutory provision to the effect that grand larceny is committed when the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, sheep or lamb.[1] In the case of wild animals, however, only a qualified right of private ownership can be obtained. The wild game in the state not reduced to possession of private parties belongs to the people in their collective sovereign capacity,[2] as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state

22. Ex parte Kenneke, 136 Cal. 527, 89 Am. St. Rep. 177, 69 Pac. 261, per Van Dyke, J., dissenting. See Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166. See GAME.

23. Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

24. Ex parte Bailey, 155 Cal. 472, 132 Am. St. Rep. 95, 31 L. R. A. (N. S.) 534, 101 Pac. 441; People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374. See FISH AND FISHERIES.

25. Civ. Code, § 655.

1. Pen. Code, § 487. See LARCENY.

2. Ex parte Bailey, 155 Cal. 472, 132 Am. St. Rep. 95, 31 L. R. A. (N. S.) 534, 101 Pac. 441; Ex parte Kenneke, 136 Cal. 527, 89 Am. St. Rep. 177, 69 Pac. 261; Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684; People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402.

of the Union.[3] Inasmuch as wild game belongs to the people of the state, it is not the subject of private ownership, except in so far as the people may elect to make it so.[4]

The extent to which individual ownership in wild animals can be acquired is defined in section 656 of the Civil Code, which provides that:

"Animals wild by nature are the subject of ownership, while living, only when on the land of the person claiming them, or when taken and held in possession, or disabled and immediately pursued."

By this section, ownership in wild animals may exist in four classes of cases. The property is acquired only by occupancy, possession, custody or control, though actual seizure is not indispensable, as in the first class, wild animals on the land of an owner or lessee of a hunting preserve belong to such owner or lessee.[5] Animals which have been tamed and which possess an animum revertendi are the subject of ownership though they may have accidentally escaped or strayed from the immediate possession of the owner. But ownership in wild animals possessing no animum revertendi continues only so long as the animal is in the possession of the claimant, for the code specifically provides that such animals are the subject of ownership when taken and held in possession.[6]

§ 4. **Protection of Ownership in Wild Animals.**—When within the provisions of the code section relating to ownership in wild animals, an individual is as much to be protected in the enjoyment of his rights in this species of

3. People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374. See FISH AND FISHERIES; GAME.

4. Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684; People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402.

5. Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166.

6. In re Ackerman, 6 Cal. App. 5, 91 Pac. 429. See 1 Ruling Case Law, 1066.

property as in any other under the law.[7] The owner of such animals has a remedy by damages for the trespass committed, and also a remedy by replevin. Thus, where a lease confers upon the lessee the right to utilize a portion of the wild goats within his inclosures, the lessee has a remedy by claim and delivery against anyone, even the lessor, wrongfully taking goats out of his possession. It cannot be successfully urged against such right of action that the lessee does not have the right to all the goats or to any particular ones, as the plaintiff is given dominion over all of them with the right of selection for the purpose of killing or other utilization.[8] Again, a lessee of a hunting preserve has such rights in wild birds and animals within his inclosure as entitles him to protect them from invasion by those not authorized to be there. Any person violating such rights is as much of a trespasser as though entering the lessee's dwelling unbidden, and the lessee may maintain an action against him for damages, or when irreparable injury is threatened, he may enjoin the trespasser from committing further trespasses. The destruction of a hunting privilege by driving away the birds and deterring their return makes out a case of irreparable damage within the rule.[9]

§ 5. Increase of Animals.—The word "increase" though variously used, has acquired a special meaning when applied to domestic animals. So applied, unless otherwise expressly qualified in the context of an agreement relating thereto, it invariably means the offspring, progeny or young of such animals. It does not include the profit arising from the use of the animals, as the wool of sheep. Quite possibly because domestic animals are so frequently considered as herds, the word "increase" has acquired this partially specialized meaning in respect to them, although now it is so understood even when a single animal is

7. Kellogg v. King, 114 Cal. 378, 51 Pac. 684, 55 Am. St. Rep. 74, 46 Pac. 166.

8. Garcia v. Gunn, 119 Cal. 315, 55 Am. St. Rep. 74, 46 Pac. 166.

9. Kellogg v. King, 114 Cal. 378,

spoken of.[10] It is a well-settled rule that, in the absence of any agreement to the contrary, the increase of animals belongs to the owner of the parent stock.[11] Being the owner he can sell, or create a lien upon the progeny as well as sell or create a lien on the parent stock.[12] But to create a lien upon the progeny or offspring, they must be specifically mentioned in the instrument creating it. If not so specifically mentioned, the increase belongs to the mortgagor retaining possession of the animals. This rule follows from the fact that in California a mortgagor is not, by the execution of a chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon. In the absence of any express agreement upon the subject, the lien of a mortgage is limited to the property described in the mortgage, and does not include other property of the same character which the mortgagor may have afterward acquired and placed with the mortgaged property. If he retains the use of the property, whatever income or profit may be derived from such use belongs to him.[13] It is immaterial in this connection, whether or not the offspring were in gestation at the date of the mortgage. As the lien of the mortgage extends only to the property described therein, the mortgagor is the owner of the offspring in gestation at the date of the mortgage, and has the same right to dispose of them as he has to dispose of oranges on trees, or wheat in the ground or standing in the field when a mortgage of the land was made.[14]

10. Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460. Contra, Alferitz v. Ingalls, 83 Fed. 964.

11. Shoobert v. De Motta, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487; Alferitz v. Ingalls, 83 Fed. 964.

12. Alferitz v. Ingalls, 83 Fed. 964. See CHATTEL MORTGAGES.

13. Shoobert v. De Motta, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487. See CHATTEL MORTGAGES.

14. First Nat. Bank v. Erreca, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926.

III. LICENSES AND POLICE REGULATIONS.

§ 6. Power to Require Licenses and to Regulate— *Grazing sheep or cattle.*—The Political Code empowers boards of supervisors, in the exercise of their police powers and for the purpose of regulation and not otherwise, to license all and every kind of business not prohibited by law and transacted and carried on within the limits of their respective jurisdictions.[15] The raising, grazing, herding or pasturing of sheep or cattle is or may be a business within the meaning of this provision.[16] And while it is a lawful vocation, there can be no question that it is an occupation which may properly be subjected to reasonable regulations for the purpose of preventing or lessening the annoyance or discomfort, which, if unrestrained, it would be likely to cause.[17] It follows that boards of supervisors may, for the purpose of regulation, require licenses of persons engaged in such business.[18] Formerly, under the County Government Act, such licenses could be required both for the purpose

15. Pol. Code, §§ 3366, 4041, subd. 25. See Const., art. XI, § 11, vesting counties, cities, towns and townships with police power. See infra, § 14.

16. Ex parte Mirande, 73 Cal. 365, 14 Pac. 888.

17. County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909; Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 Pac. 277.

18. County of Sierra v. Flanigan, 149 Cal. 769, 87 Pac. 913; County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909; In re McCay, 10 Cal. App. 116, 101 Pac. 419. (But, says the court, it is difficult to reconcile as just, a law which singles out the industry of raising sheep for regulation among all the varied farm industries of the state to the exclusion of cattle, horses, mules, and goats and other farm industries. Such ordinances have been upheld however. See other cases cited in this note); Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 Pac. 277; Flanigan v. Sierra County, 196 U. S. 553, 49 L. Ed. 597, 25 Sup. Ct. Rep. 314, see, also, Rose's U. S. Notes. See County of Inyo v. Erro, 119 Cal. 119, 51 Pac. 32 (holding that the words "engaged in," in an ordinance requiring licenses of persons "engaged in the business of raising" sheep, is synonymous with the words "transacted and carried on" as found in the County Government Act); County of Mono v. Depauli, 9 Cal. App. 705, 100 Pac. 717, as to mode of enacting ordinance.

of regulation and of revenue,[19] but by an amendment to the Political Code in 1901, this power was restricted to licenses for the purpose of regulation only. The code provision as amended authorized boards of supervisors to require licenses, in the exercise of their police power and for the purpose of regulation and not otherwise.[20] The use of the words "and not otherwise," clearly discloses a legislative intent to restrict the power of boards of supervisors in this respect, and to repeal by implication the section of the County Government Act authorizing licenses for purposes of revenue.[1] The power to regulate the keeping of dogs and animals running at large is discussed in a subsequent section.[2]

Inspection and quarantine laws—Destruction and disposal of diseased animals.—A statute has been enacted

19. County of Inyo v. Erro, 119 Cal. 119, 51 Pac. 32; County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716 (holding a license tax is a tax within the meaning of the constitutional provision authorizing the legislature to vest in the corporate authorities of counties, towns and cities, the power to assess and collect taxes); Ex parte Mirande, 73 Cal. 365, 14 Pac. 888 (holding the fact that the sheep are subject to a property tax ad valorem, does not interdict the right to impose a license upon the business of sheep-raising nor does the constitutional provision in relation to uniformity of taxation apply to prevent a license tax upon one occupation if it reaches all who follow that occupation). See Lassen County v. Cone, 72 Cal. 387, 14 Pac. 100, holding an ordinance invalid which exempted all persons who list their sheep as taxable property in the county and pay taxes on them as such. The constitution requires that taxes be uniform.

20. Pol. Code, §§ 3366, 4041, subd. 25.

1. Wheeler v. County of Plumas, 149 Cal. 782, 87 Pac. 802, S. C. 22 Cal. App. 487, 135 Pac. 50 (holding party may sue to recover back amount of tax paid involuntarily); County of Sierra v. Flanigan, 149 Cal. 770, 87 Pac. 801; County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909; Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 Pac. 277 (holding an ordinance passed before 1901 when the county had the power to license for purposes of revenue and for regulation, will not be presumed after that date to have been enacted for purposes of regulation only, in the absence of anything on the face indicating that such is its purpose); Flanigan v. Sierra County, 196 U. S. 553, 49 L. Ed. 597, 25 Sup. Ct. Rep. 314, see, also, Rose's U. S. Notes. See LICENSES, as to what constitutes a license for revenue.

2. See infra, §§ 31, 49.

which declares that any person who shall knowingly sell, or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or expose, any horse, mule, or other animal having the disease known as glanders or farcy, or who shall bring, or cause to be brought or aid in bringing into the state any sheep, hog, horse, or cattle, or any domestic animal, knowing the same to be affected with any contagious or infectious disease, shall be guilty of a misdemeanor.[3] And it is provided that every animal having glanders or farcy shall at once be deprived of life by the owner or person in charge thereof, upon discovery or knowledge of its condition.[4] There are also provisions to the effect that animals affected with contagious or infectious diseases must be kept within an inclosure or herded in some place where they are secure from contact with other animals of like kind not so affected;[5] that any practitioner of veterinary medicine, upon gaining information thereof, must immediately report the name and address of the owner or person in charge of any animals affected with certain enumerated diseases;[6] that any person having the care, custody or control of any animal that dies of an infectious disease shall immediately bury or cremate it; that a common carrier shall not transport an animal suffering with or that has died from an infectious disease any greater distance than is necessary to transport such animal to the nearest crematory; that no animal that has died of any infectious

3. Pen. Code, § 402. See, also, act of April 12, 1915, Stats. 1915, p. 59 (which prevents the importation into the state of horses, mules, dairy cattle and breeding bulls which are affected with communicable diseases, provides for the inspection or certification of such animals before being brought into the state, exempts certain animals from such inspection or certification, provides penalties for violating any of the provisions of the act, and repeals certain acts); and act of June 13, 1913, Stats. 1913, p. 783 (enacted to prevent the introduction of rabies or other animal diseases dangerous to human beings, into portions of the state not infected, to control the spread of such diseases after introduction; and authorizing the state board of health to make rules and regulations therefor).

4. Pen. Code, § 402b.

5. Pen. Code, § 402d.

6. Pen. Code, § 402e.

disease shall be sold, used, or permitted to be used for the food of human beings or of any domestic animal or fowl;[7] and that the sale of cattle or other livestock infected with the Boophilus annulatus tick is prohibited.[8] Furthermore, laws have been passed with regard to the preparation and distribution of serums or vaccines for the prevention of hog cholera.[9] It is also to be observed in this place that the board of supervisors, in their respective counties, are given the jurisdiction and power, under such limitations and restrictions as are prescribed by law, to provide for the destruction of gophers, squirrels, other wild animals, noxious weeds, and insects injurious to fruit or fruit trees, or vines, or vegetable or plant life;[10] and that an act has been adopted which provides for the control and the destruction of predatory animals, vesting in the state commissioner of horticulture the administration of the provisions thereof, and defining his powers and duties in relation thereto.[11]

§ 7. Limitation on Power to Regulate and Amount of Fee.—It is within the legislative discretion to place such restrictions upon the business of cattle-raising, as upon the conduct of other business, as may be reasonably necessary for the public safety, comfort or health. The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere under the guise of regulation, unless arbitrary or unreasonable

7. Act March 20, 1905; Stats. 1905, p. 317. See act of May 11, 1917, Stats. 1917, p. 423 (providing for the inspection of animals slaughtered for human food, for the inspection of the meat and meat food products of such animals, for the collection of fees to defray the expenses of such inspection, for the appointment and duties of officials to carry into effect the provisions of the act, for the marking of carcasses and parts thereof, and providing a penalty for violation of any provision of the act).

8. Act March 21, 1907; Stats. 1907, p. 763.

9. Act April 21, 1911, Stats. 1911, p. 1064. Act June 1, 1915, Stats. 1915, p. 1064.

10. Pol. Code, § 4041, subd. 26.

11. Act May 2, 1919, Stats. 1919, p. 178. See Pen. Code, § 637½ (where the words "predatory animals" are defined).

burdens have been imposed.[12] The amount of the license fee must not be more than is reasonably necessary for the purpose sought,—i. e., the regulation of the business, considering the necessary or probable expenses incident to the licensing, inspection and enforcement of the ordinance under a proper system of supervision and police surveillance, including the labor of officers and other expenses thereby incurred, and all the incidental consequences that may be likely to subject the public to cost, in relation to the business regulated.[13] The license fee must have relation to expenses incurred for these purposes. It may not be gauged upon an estimate of consequences or damages which may result from the business. These may be considered as suggesting the necessity for regulatory provisions, but not as a basis by which to determine the amount of the license fee. Accordingly, the damage to roadways by sheep cannot be allowed as an item of expense to be met with a license charge.[14]

With reference to the licensing of sheep, an act forbids the imposing of a license fee in excess of five cents per head.[15] This act is a restrictive measure, and does not confer authority to impose a fee in the amount fixed. In fact, the legislature is without power to impose an unreasonable tax, and is without power to delegate such power to a municipality. The reasonableness of a fee not in ex-

12. County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909; In re Miller, 13 Cal. App. 564, 110 Pac. 139.

13. County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909. (A tax of ten cents per head upon sheep and lambs cannot be adjudged unreasonable, in the absence of evidence as to the cost of regulation.) In re Miller, 13 Cal. App. 564, 110 Pac. 139; In re McCoy, 10 Cal. App. 116, 101 Pac. 419.

14. In re McCoy, 10 Cal. App. 116, 101 Pac. 419.

15. Stats. 1903, p. 41. Compare County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909, which did not refer to this statute but held that a fee of ten cents per head could not be said to be unreasonable in the absence of evidence as to cost of regulation of the industry.

cess of this statute must, therefore, be determined independently of this act.[16]

§ 8. Persons Required to Pay License Charge.—An ordinance requiring everyone engaged in the business of raising, grazing, herding or pasturing sheep in the county to procure a license, applies to all persons engaged in the business in the county, whether they are residents of the county or not. Indeed, if the ordinance did not apply to nonresidents, it would be void, because it would not be uniform, in that it allowed nonresidents to carry on the business on more favorable terms than residents.[17] Such an ordinance does not, however, apply to a person who neither raises, herds, or pastures his sheep in the county, but who merely takes them there temporarily on his farm for the purpose of shearing them,[18] or who only drives the sheep through the county as expeditiously as possible.[19] But, of course, the license fee cannot be evaded by the mere pretense of driving sheep through or into a county, for an alleged temporary purpose, when it is evident that the real object in so doing, and what is really done, is to graze and pasture sheep in the county.[20] This question being one of the purpose and intent with which the sheep are in the county, the determination of the real object is a question of fact, as to which a finding of the trial court upon conflicting evidence is binding on the appellate court.[21] By an act passed in 1919, persons and corporations who do not have their principal home ranches and livestock headquarters in the state, are forbidden to herd or graze sheep or cattle upon uninclosed lands in the state, unless they first obtain a valid license therefor. But if

16. In re McCoy, 10 Cal. App. 116, 101 Pac. 419 (whether lambs are embraced by this act, query).

17. County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716.

18. County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716.

19. County of Mono v. Flanigan, 130 Cal. 105, 62 Pac. 293; County of Inyo v. Erro, 119 Cal. 119, 51 Pac. 32. See, also, In re McCoy, 10 Cal. App. 116, 101 Pac. 419.

20. County of El Dorado v. Meiss, 100 Cal. 268, 34 Pac. 716.

21. County of Inyo v. Erro, 119 Cal. 119, 51 Pac. 32.

such persons or corporations own or lease land in the state, they are exempt from any license for five head of sheep and three head of bovine cattle for each acre so owned or leased.[22]

IV. BAILMENT.

§ 9. Bailment Generally.—With reference to the bailment of animals, the fundamental principles underlying the subject of bailments control.[23] A contract by which an owner delivers possession of cattle to another upon the terms that the latter shall care for and return them at a stated time, the increase to be divided between them, does not constitute a partnership but is a contract of bailment.[24] It is the duty of a depositary of a living animal,[25] and of one who borrows a living animal for use without reward,[26] to treat it kindly and provide everything necessary and suitable for it. A gratuitous bailee charged with the care of stock is only required to use slight care for the preservation of the stock left with him. Unless he is guilty of gross negligence, he is not liable for injuries to them caused by other stock in his possession. And when the bailor assumes the care and responsibility of the animals the bailee is not liable for their loss not caused by his negligence or fault.[27]

One who hires an animal must use ordinary care for its preservation,[28] and is responsible in damages if the animal is injured or dies by reason of the negligence of himself or his servant.[29] If one hires a horse to

22. Stats. 1919, p. 753.

23. See BAILMENT.

24. Robinson v. Haas, 40 Cal. 474.

25. Section 1834 of the Civil Code reads: "A depositary of living animals must provide them with suitable food and shelter, and treat them kindly."

26. Section 1887 of the Civil Code reads: "One who borrows a living animal for use, must treat it with great kindness, and provide everything necessary and suitable for it."

27. Davis v. National Lumber Co., 22 Cal. App. 111, 133 Pac. 509.

28. Civ. Code, § 1928.

29. Lintott v. San Francisco Const. Co., 10 Cal. App. 372, 101 Pac. 1064, holding the evidence was sufficient to show negligence, and that the horses were hired by the defendant instead of by another company.

be driven to a specified place, the driving of the horse beyond that place is a violation of the contract of bailment and an unlawful conversion. If, in such case, the horse dies, or the bailee fails to return it, the owner may recover its value in damages. If, on the other hand, the minds of the parties do not meet as to the particular place to which the horse is to be driven, the bailee is not liable in damages in case the horse dies, without his fault.[30]

In accordance with the general rule that a sale of goods passes to the purchaser only such title as the vendor had, a sale of livestock by a bailee thereof does not pass a good title to the purchaser, though he may have purchased in good faith and without notice of the bailor's title. The owner may maintain an action against the purchaser for the stock, and he is not precluded from recovering by the fact that he may have authorized the bailee to drive the stock to distant parts of the state, thereby enabling the bailee to act as owner. Inasmuch as the purchaser stands in privity with the bailee, admissions of the bailee, while in possession, tending to show how he held the cattle, are admissible in evidence against the purchaser when sued for the cattle.[31]

Saver of domestic animal.—It is expressly provided by statute that if a person saves a domestic animal from drowning or starvation, he must, within a reasonable time, inform the owner thereof, if known, and make restitution to him upon demand, without compensation except a reasonable charge for saving and caring therefor. And it is further declared that if the owner is not known to such saver, he must, within five days, file an affidavit with the justice of the peace of the county whose office is nearest

30. Welch v. Mohr, 93 Cal. 371, 28 Pac. 1060. In section 1930 of the Civil Code it is provided: "When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded." See, also, LIVERY STABLE AND GARAGE KEEPERS.

31. Robinson v. Haas, 40 Cal. 474. See BAILMENT.

to the place of such saving, particularly describing the animal and the time, place and circumstances under which it was saved.[1] There is also a statutory provision which sets forth the circumstances under which the saver of the animal may become its owner.[2]

§ 10. Agistment Defined and Distinguished.—Webster defines the word "agist" to mean "to take to graze or pasture at a certain sum," and "agistment" as "the taking and feeding other men's cattle in the king's forest, or on one's own land, at a certain rate."[3] An agister then is one who takes in horses or cattle to pasture, having charge and control of them.[4] A contract of agistment is distinct from a lease.[5] The fact that the owner of land may take some risk as to whether pasture is good or not is not a determining factor with reference to the question whether an instrument is a contract of agistment or a lease, as all landlords who take a share of the product of rent, take such a risk.[6] The distinguishing feature between them lies in the fact that in an agistment the possession of the owner of the land or the agister is not divested, whereas in the case of a lease, the lessor is divested of and the lessee is put in possession. The fact that a contract requires the owner of the cattle to bear the cost and risk of herding his own cattle does not show an intention that possession of the land shall be transferred and show that it is a lease. On the contrary, such a pro-

1. Civ. Code, § 1865 (providing also for the appraisement of the value of the animal and for the recordation of a list of the value and description of the animal in the "Estray and Lost Property Book"); Pol. Code, § 3136 (duty of persons finding lost money, goods, etc.). See infra, § 20 et seq., as to trespassing animals, estrays and animals running at large. And see LOST PROPERTY.

2. Civ. Code, § 1871.

3. Williams v. Miller, 68 Cal. 290, 9 Pac. 166, in Bank, 6 Pac. 14, in Department.

4. Vaughn v. Bixby, 24 Cal. App. 641, 142 Pac. 100. See Howard v. Throckmorton, 59 Cal. 79.

5. Williams v. Miller, 68 Cal. 290, 9 Pac. 166. See Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087. See LANDLORD AND TENANT.

6. Howard v. Throckmorton, 59 Cal. 79.

vision shows the agreement to be a contract of agistment, as the owner of the cattle would be required to perform such acts if the instrument were a lease and no such provision would be necessary.[7]

§ 11. Rights and Liabilities of Parties.—Unlike an innkeeper or common carrier, an agister is under no legal obligation to take charge of or keep any cattle that may be brought to him for that purpose. He may receive or refuse them, without violating any duty or obligation imposed on him by law, and he is at perfect liberty, when he receives livestock, to impose such terms and conditions as he may deem proper.[8] The agister may require the owner to bear the cost and risk of herding his own cattle,[9] or he may merely require the owner to furnish the herders, and himself assume the duty of agister to take charge of and care for the cattle. In the latter case, the herders, though provided by the owner are subordinates of the agister and are bound to obey his commands. If the herders abandon their work without cause, it is the duty of the owner to furnish others, failing which the agister may employ others at the owner's expense.[10]

An agister, as a depositary of living animals, is required to provide them with suitable food and shelter, and treat them kindly.[11] While he is not an insurer against injury to or loss of the stock intrusted to his keeping, he is bound to take reasonable care thereof, and injury or loss resulting from ordinary casualties that could have

7. Williams v. Miller, 68 Cal. 290, 9 Pac. 166, in Bank. See 6 Pac. 14, opinion in Department. See Howard v. Throckmorton, 59 Cal. 79.

8. Lewis v. Tyler, 23 Cal. 364. See section 1853 of the Civil Code which provides: "In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week."

9. See supra, § 10.

10. Dennis v. Belt, 30 Cal. 247, where it was said that, since the herders are subordinates of the agister, hearsay evidence of declarations of the herders favorable to the defendant are not admissible in evidence for the defendant.

11. Mitchell v. Excelsior Water & Mining Co. (Cal. App.), 182 Pac. 326. See supra, § 9.

been averted by the exercise of such reasonable care constitutes negligence for which he is responsible. In this case reasonable care is that degree of care which it is presumed an ordinarily careful and prudent man would have exercised under the same circumstances with reference to his own stock. Unless it can be said that the facts and circumstances established are such that reasonable men can reach but one conclusion therefrom, the question as to whether or not an agister exercised the required degree of care is a question for the determination of the jury.[12] In accordance with these rules an agister may be held liable for the loss of stock through a negligent failure to provide sufficient water,[13] or food and shelter.[14] The agister is forbidden to use the animals or permit anyone other than the owner or person entitled so to do, without the owner's consent.[15] He is required at the end of the term to return cattle left with him. As this duty is implied by law, it is not necessary to incorporate any provision to this effect in a contract of agistment.[16]

§ 12. **Actions.**—An agister may by action recover, of the person contracting with him for pasturage, compensation for the care and keeping of animals left with him, and the defendant in such an action cannot avoid liability by showing that some of the cattle belong to another or may belong jointly to the defendant and another.[17] It is, however, a condition of a contract of agistment that

12. Vaughn v. Bixby, 24 Cal. App. 641, 142 Pac. 100. See Williams v. Miller, 6 Pac. 14, in Department; 68 Cal. 290, 9 Pac. 166, in Bank.

13. Vaughn v. Bixby, 24 Cal. App. 641, 142 Pac. 100, where it was held that a special finding of the jury that there was sufficient water in a pasture for horses is not inconsistent with a general verdict for the plaintiff, if it is also found that the water was inaccessible.

14. Mitchell v. Excelsior Water & Mining Co. (Cal. App.), 182 Pac. 326. See Howard v. Throckmorton, 59 Cal. 79.

15. Pen. Code, § 537c, making it a misdemeanor to use or permit use of animals without consent of the owner.

16. Dennis v. Belt, 30 Cal. 247.

17. Howard v. Low, 1 Cal. Unrep. 82.

the land should be suitable for grazing, and if the cattle are removed because the land is unsuitable, the agister cannot recover compensation for pasturage, though the owner may have agreed to pasture a designated number of cattle.[18] This is in accordance with the well-settled rule that where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent.[19]

Moreover, an owner of livestock may bring an action against the agister for damages for loss or injury to his cattle resulting from a negligent failure to provide sufficient food or water.[20] The defendant, in such an action, in making his defense, is entitled to show, if he can, that the ranges were not overstocked, that there was sufficient feed growing on the ranges to supply in a proper measure all the cattle grazing thereon, and that the death of the plaintiff's cattle was due to other causes than that of want of sufficient feed. This is a proper matter of defense and a defendant is not prohibited from showing it because he was improperly refused permission to go into this matter on cross-examination of the plaintiff's witnesses. It is not improper cross-examination of an agister, who has testified as to the number of stock usually kept on certain ranges, to ask him whether the range was overstocked at the time the plaintiff's cattle died. Such a question does not call for expert testimony in the strict legal concept of that phrase.[1]

§ 13. **Lien.**—It is a general rule of law that in the absence of a statute or of a special agreement to that

18. Williams v. Miller, 68 Cal. 290, 9 Pac. 166, in Bank. See 6 Pac. 14, opinion in Department.

19. Mineral Park Land Co. v. Howard, 172 Cal. 289, L. R. A. 1916F, 1, 156 Pac. 458, approving Williams v. Miller, 68 Cal. 290, 9 Pac. 166. See CONTRACTS.

20. See supra, § 11.

1. Mitchell v. Excelsior Water & Mining Co. (Cal. App.), 182 Pac. 326. As to expert and opinion evidence generally, see EVIDENCE.

effect, one who merely provides food and takes care of an animal, as an agister or a livery-stable keeper, has no lien on the property for compensation in pasturing, caring for or feeding it.[2] The law gives innkeepers and common carriers a lien for their reasonable charges because they are compelled to take the care and custody of goods,[3] and it gives a lien to persons who, by their labor and skill, have imparted an additional value to the goods.[4] An agister or livery-stable keeper is neither compelled to take the charge and custody of animals of others, nor does he by doing so add to their value. Consequently, he has no lien, unless there be a statute or special agreement to that effect. This rule has been recognized in California, but now it is provided by statute that livery or boarding or feed stable proprietors and persons pasturing horses or stock, have a lien, dependent upon possession, for their compensation in caring for, boarding, feeding, or pasturing such horses or stock.[5] This statute expressly and unconditionally gives a lien for pasturing stock, and it is not necessary to the enforcement of such lien that the plaintiff should be engaged in that general business.[6]

It is essential, however, that the animal be placed with the agister by its owner or by someone having authority from him. There is no good reason why a person not the owner should be permitted to pledge property or create a lien on it any more than he should be permitted to sell it. And it has been said that a contrary rule would be in vio-

2. Lewis v. Tyler, 23 Cal. 364. See, also, LIVERY STABLE AND GARAGE KEEPERS.

3. See CARRIERS; INNKEEPERS.

4. See LIENS.

5. Civ. Code, § 3051 (lien on personal property for services thereon); and section 3052 (lienholder may sell property); Seale v. McCarthy, 148 Cal. 61, 82 Pac. 845. See Johnson v. Perry, 53 Cal. 351 (holding that the act of April 4, 1870 [Stats. 1869–70, p. 723], giving to proprietors of stables and ranches or farms a lien upon all livestock pastured, kept, or fed by them under contract with the owners thereof, though not contained in the code as first enacted, was not repealed by the code. The code was amended in 1877–78, by adding the provision referred to in the text).

6. Seale v. McCarthy, 148 Cal. 61, 82 Pac. 845.

lation of the fundamental rights of property guaranteed by the constitution.[7] Under this rule no lien is created in favor of an agister when an animal is left with him by one who has possession under a conditional sale but who never acquires title by reason of default in payment of the purchase price.[8] The courts have not yet determined whether an owner of stock can, by cross-complaint filed in an action to enforce an agister's lien, recover damages resulting from a refusal to surrender possession of such stock on a payment or tender of the amount due. Whatever may be the rule in this respect, a cross-complaint seeking such damages is insufficient which does not allege that the sum tendered was the full amount due at the time the tender was made.[9]

V. BREEDING.

§ 14. Duties of Owner of Animals.—Every person who keeps a stallion, jack, or bull, and who permits the same to be used for the purpose of propagation for hire, is required annually to obtain a license therefor from the tax collector. The license so obtained entitles the holder thereof to the right to go into any county of the state for the purpose of propagation, without further license or expense.[10] The owner of such animal may register him with clubs or associations organized for the purpose of improving breeds of animals. But every person who by any false or fraudulent pretense obtains from any club, association, society, or company, organized for the purpose of improving the breed of cattle, horses, sheep, swine, or other domestic animals, a certificate of registration of any animal in the herd register, or any other register of any such club, association, society, or company, or a trans-

7. Lowe v. Woods, 100 Cal. 408, 38 Am. St. Rep. 301, 34 Pac. 959; Sargent v. Usher, 55 N. H. 287, 20 Am. Rep. 208; Stott v. Scott, 68 Tex. 302, 4 S. W. 494; Dorman v. Green, 4 Willson (Tex.), Civ. Cas. Ct. App. 563, § 322, 19 S. W. 909.

8. Lowe v. Woods, 100 Cal. 408, 38 Am. St. Rep. 301, 34 Pac. 959.

9. Seale v. McCarthy, 148 Cal. 61, 82 Pac. 845.

10. Pol. Code, § 3385.

fer of such registration, and any person who, for a valuable consideration, gives a false pedigree of any animal, with intent to mislead, is guilty of a misdemeanor.[11] The owner of breeding animals should not allow them to become a nuisance, and the Penal Code makes it a misdemeanor for anyone to let a stallion or jack to mares or jennies within the limits of any city, town or village, or within four hundred yards thereof, except in an inclosure sufficient to obstruct the view of all the inhabitants within such limits, and for any person in charge of any stallion, bull, boar, ram, or buck goat to turn out or permit such animal to be turned out or run at large in any county.[12]

§ 15. Lease and Service of Animals.—The owner of a stallion or other breeding animal may lease such animal. A lease in which the lessor reserves the right to have the horse or other animal cover a certain number of animals is assignable, and the assignee of the contract and purchaser of the animal is entitled to all the benefits arising out of the contract and the ownership of the horse that his assignor would have been entitled to, had he continued to be the owner of the horse and the contract. But before the assignee can avail himself of the benefits of the contract, he must give notice to the lessee of the horse of the purchase and assignment.[13] While the success of service by a male breeding animal may be warranted, so as to preclude a recovery of the stipulated fee in case such service is unsuccessful,[14] in the absence of such a warranty, the owner of the animal bred is liable for the price of the service, though it may prove unsuccessful. Even where he is given the privilege of return the following season, he is liable for the service fee, if he fails to avail himself of the privilege.[15]

11. Pen. Code, § 537a.
12. Pen. Code, § 597g.
13. Doll v. Anderson, 27 Cal. 248.
14. See 1 Ruling Case Law, 1085.
15. Durfee v. Seale, 139 Cal. 603, 73 Pac. 435. (The facts of this case are not fully stated in the opinion, but from the findings of the trial court, it appears that the owner of the mare failed to avail himself of the return privilege.)

The code gives every owner or person having any stallion, jack, or bull used for propagating purposes, a lien for the agreed price of its service upon any mare or cow and upon the offspring of such service, unless some willfully false representation concerning the breeding or pedigree of such stallion, jack, or bull has been made or published by the owner or person in charge thereof, or by some other person, at the request or instigation of such owner or person in charge.[16] The claimant of such lien is required to file a verified claim, setting forth the particulars specified in the statute, within ninety days after the service on account of which the lien is claimed. When so filed, the claim is notice to subsequent purchasers and encumbrancers of the mare or cow and of the offspring of such service for one year after such filing.[17]

VI. Marks and Brands.

§ 16. In General.—The difficulties growing out of the ownership of numerous parties, of herds of stock with their rapid increase are great, and the legislature in order to prevent controversies, and to secure the evidence of ownership in a practical mode best adapted to the circumstances of the country, has passed laws regulating the marking, branding and counterbranding of stock which are imperative in character and are required by the wants and necessities of the country.[18] Thus, the law requires every owner of horses, mules, cattle, sheep, goats or hogs running at large to have and record a brand or counter-

16. Civ. Code, § 3062 (regarding lien of person in charge of stallion, etc.), and section 3064 (action to enforce lien). See supra, § 14, concerning the giving of false pedigree as a misdemeanor.

17. Civ. Code, § 3063.

18. Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135. See Logan v. Gedney, 38 Cal. 579; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561 (holding the act concerning marks and brands is repugnant to the common-law rule concerning trespassing animals); Pol. Code, § 19, subd. 4 (continuing in force all acts regulating and in relation to rodeos); subd. 11 (continuing in force an act concerning marks and brands in the county of Siskiyou, approved March 20, 1866).

brand different from any one in use by any other person, so far as may be known.[19] It requires the owners to give rodeos at stated periods of the year for the purpose of segregating their stock, and marking and branding it so as to designate the owner.[20] It also requires such persons, when they sell their animals, to counterbrand them or give a written descriptive bill of sale,[1] and requires all persons slaughtering animals to keep the hides for fifteen days to enable persons to examine them on demand.[2] Treated as a police regulation, the latter code provision does not seem to be so unreasonable as to be void, as being in violation of the constitutional guarantee against unreasonable seizures and searches. No penalty whatever is affixed to a violation of this provision, and if any liability can accrue from such violation it must be established in a civil action in favor of the party injured thereby. A failure to comply with the statute is not a crime. Neither is it evidence of a crime, and in a prosecution for larceny of a branded animal, it is reversible error for the trial court to instruct the jury with reference to this statute as the effect of such an instruction is to invoke against the defendant the violation of another statute for the purpose of establishing his guilt.[3]

19. Pol. Code, § 3167 (necessity of brands); § 3168 (recording brands and fees); § 3169 (transmission of transcript of recorded brands to adjoining counties); § 3170 (brands unlawful unless recorded); § 3171 (certain marks not allowed); § 3183 (penalty for using more than one mark or an unrecorded mark). See Stats. 1917, p. 138, an act to perpetuate marks, brands and counterbrands established in certain counties. And see, also, People v. Chutnacut, 141 Cal. 682, 75 Pac. 340 (citing code section without definite application).

20. Stats. 1850–53, p. 337. See Pol. Code, § 3172, as to when animals must be branded; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135.

1. Pol. Code, § 3182. See Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135 (holding this statute does not dispense with a delivery of possession when the animals are sold. Norton, J., concurring specially, says the law does not require a branding by the purchaser, but only a counterbranding by the seller, or a bill of sale).

2. Pol. Code, § 3185.

3. People v. Tipton, 73 Cal. 405, 14 Pac. 894.

In case of dispute in regard to a mark or brand, the code provides that the person first recording the same is entitled thereto.[4] When a cattle owner delivers possession of his cattle and branding iron as security for an obligation, and the mortgagee, on satisfaction of the obligation, refuses to redeliver the branding iron, an action at law for damages and for the return of the iron is not the proper remedy when the real question between the parties is not the right to possession of the iron, but the right to use a certain brand. A court of equity alone can afford effectual relief in such a case.[5]

§ 17. **As Evidence.**—The Political Code provides that a properly certified copy of a brand as made by the recorder is evidence on the trial of any action in a court of competent jurisdiction as to the ownership of all animals legally marked or branded.[6] It also provides that such marks or brands are not lawful unless recorded.[7] While it has been elsewhere held that, where the subject of branding is regulated by statute, an unrecorded brand is not admissible in evidence for the purpose of proving ownership, though perfectly proper so far as proving identity is concerned,[8] in California, in a prosecution for larceny of animals, an unrecorded mark or brand found on the animal and identified as that used by the person alleged to be owner, is some evidence of his ownership.[9] And in a prosecution for larceny of a sucking calf, unrecorded marks and brands upon the mother of the calf are some evidence as to ownership of the calf.[10] Brands may be the subject of expert testimony, and a witness who shows

4. Pol. Code, § 3172.

5. Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119.

6. Pol. Code, § 3168; Pol. Code, § 3172 (weight of brand as evidence of ownership in an action to recover possession of a branded animal).

7. Pol. Code, § 3170.

8. See 1 Ruling Case Law, 1083, § 24.

9. People v. Bolanger, 71 Cal. 17, 11 Pac. 799. See People v. Hutchings, 8 Cal. App. 550, 97 Pac. 325. See, also, LARCENY.

10. People v. Romero, 12 Cal. App. 466, 107 Pac. 709.

sufficient knowledge about brands and cattle-marks to testify upon the subject may be examined as an expert, although he may not be familiar with particular brands used in certain counties.[11]

§ 18. Changing or Defacing.—The Penal Code provides that every person who marks or brands, alters, or defaces the mark or brand of any horse, mare, jack, jennet, mule, bull, ox, steer, cow, or calf belonging to another, with the intent thereby to steal the same, or to prevent identification thereof by the true owner, is punishable by imprisonment in the state's prison for not less than one nor more than five years.[12] And every person who marks or brands, alters or defaces the mark or brand of any sheep, goat, hog, shoat, or pig belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, is guilty of a misdemeanor.[13] The crimes charged in these code sections are wholly distinct from the offense of larceny. They are not in any sense a necessary element of larceny and cannot be said to be necessarily included therein. Consequently, one cannot be convicted of them under an information charging the larceny of an animal, and after dismissal of the information charging larceny, one may be tried and convicted of the offense of altering brands of cattle, though the same evidence is used in both prosecutions.[14]

Under these code sections, one who in any way marks any animal therein named belonging to another, with intent thereby to prevent identification thereof by the true owner, is guilty of an offense, either a felony or a misdemeanor, depending upon the animal marked. It can make no difference that the mark placed on the animal is not of the character usually adopted for the purpose of indicating ownership, or that it may not

11. People v. Fitzpatrick, 80 Cal. 538, 22 Pac. 215. See EVIDENCE, as to expert testimony generally.

12. Pen. Code, § 357. See Scott v. Harbor, 18 Cal. 704.

13. Pen. Code, § 357½.

14. People v. Kerrick, 144 Cal. 46, 77 Pac. 711.

accomplish the purpose of preventing identification. These are matters that may properly weigh with the jury in determining as to the intent with which the marking was done. It is the placing of any mark on such an animal, with the intent thereby to prevent identification by the true owner, that constitutes the crime. The word "marks" is not limited to some conventional artificial indication of ownership placed on an animal, and includes the slitting of the ears of a horse or colt, even though such mark is generally used simply to indicate a vicious animal. It includes as well marks which might be illegal under the provisions of the Political Code. In determining whether the statutory intent was involved, the circumstances surrounding the commission of the act are to be taken into consideration.[15] To assist in the detection of crimes of this character; the code requires that any person, having knowledge of the unlawful mismarking or misbranding of stock not his own, or of the killing of stock running at large having a proper owner, shall give information thereof to some justice of peace of the proper county.[16]

§ 19. Indictment for Altering. — In an indictment charging the altering of a brand with intent to steal an animal, it is necessary, according to the strict common-law rule, to charge that the animal belonged to a particular individual or that the owner of the animal was known. Accordingly, it was held, prior to the enactment of the code, that an indictment was insufficient which charged the animal to belong to an estate of a decedent.[17] This rule has been changed by the code provision to the effect that when an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person

15. People v. Stromberg, 145 Cal. 110, 78 Pac. 472.

16. Pol. Code, § 3184.

17. People v. Hall, 19 Cal. 425 (setting out the indictment).

injured, or intended to be injured, is not material.[18] So that now any error in this respect is unimportant.[19]

VII. Trespassing Animals, Estrays and Animals Running at Large.

Trespassing Animals Generally.

§ 20. Common-law Rule Repudiated. — Early in the history of California, the rule of the common law of England requiring an owner of animals to keep them on his own close did not prevail in any county of the state, and it does not prevail now,[20] except to the extent that statutes have been passed which have the effect of enacting the common-law rule.[1] The reason therefor is historical. Before the discovery of gold, this was exclusively a grazing country, and its only wealth consisted in vast herds of cattle, which were pastured exclusively upon uninclosed lands. This custom continued to prevail after the acquisition of the country by the United States, and has been in various instances recognized by the legislature.[2]

At the same session at which the act was passed adopting the common law of England so far as it is not repugnant to the constitution and statutes of the state, the legislature passed the act concerning marks and brands,[3]

18. Pen. Code, § 956. See INDICTMENT AND INFORMATION.

19. See People v. Prather, 120 Cal. 660, 53 Pac. 259; People v. Smith, 112 Cal. 333, 44 Pac. 663. See, also, LARCENY.

20. Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100; Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600; Merritt v. Hill, 104 Cal. 184, 37 Pac. 893; Logan v. Gedney, 38 Cal. 579 (where the court says this common-law rule of England never was the law in California); Richmond v. Sacramento Valley R. R. Co., 18 Cal. 351; Comerford v. Dupuy, 17 Cal. 308; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Buford v. Hautz, 133 U. S. 320, 33 L. Ed. 618, 10 Sup. Ct. Rep. 305, see, also, Rose's U. S. Notes.

1. See infra, §§ 21, 22.

2. Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307.

3. Stats. 1850, p. 214. See Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, and Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100, where the enactments on

and the act concerning lawful fences and animals trespassing on premises lawfully inclosed.[4] At the following session, the legislature passed the act to regulate rodeos,[5] and concerning judges of the plains.[6] These statutes are clearly repugnant to this common-law rule, for, as has been said, if it were contemplated by the legislature that all such animals were to be confined to the close of the owner, where was the necessity for providing for a general herding of all the cattle of a neighborhood, after notice, in order that all might attend and each select his own, or of requiring cattle and horses to be branded before reaching a certain age, or the justice of providing that loss of crops destroyed by cattle should only be recovered by those whose farms are inclosed by a certain description of fence?[7] These statutes though enacted before the code are still in full force and effect, except in so far as they have been amended or limited by subsequent legislation, for the Political Code provides that all acts in relation to lawful fences, estrays, and the trespassing of animals upon private property are recognized as continuing in force, notwithstanding the provisions of the codes.[8]

§ 21. Revival of Common-law Rule Prior to 1879.— Necessarily, as conditions changed so that, instead of the stock-raising business being the paramount industry of

the subject are traced and summarized.

4. Stats. 1850, p. 131, amend. Stats. 1855, p. 70.

5. Stats. 1850–53, p. 337.

6. Stats. 1850–53, p. 866.

7. Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561. To same effect, see Logan v. Gedney, 38 Cal. 579; Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307.

8. Pol. Code, § 19; Gonzales v. Wasson, 51 Cal. 205 (acts concerning lawful fences, April 3, 1860, [Stats. 1860, p. 141] amending the act of 1850 [Stats. 1850, p. 131] are retained in force). See Meade v. Watson, 67 Cal. 591, 8 Pac. 311, holding that the act of April 27, 1855 [Stats. 1855, p. 154], and an act amendatory thereof, approved April 3, 1860 [Stats. 1860, p. 141], are retained in force.

"To determine the law in any county, a special expedition through the uncharted wilderness of early local statutes is necessary." 7 Cal. Law Rev. 365.

California, agricultural and horticultural interests grew to be important factors in the promotion of the material prosperity of the state, the legislative policy with regard to trespassing animals was changed accordingly, and various special acts, or statutes applying to certain counties only, were enacted to meet the exigencies of the new conditions brought about by the introduction of those industries, which in effect restored the rules of the common law.[9] Thus, with reference to Santa Clara County, it was enacted in substance that anyone finding estray domestic animals on his premises, or domestic animals running at large on a highway, whether the owner is known or unknown, may take them up, and proceed to sell them; and that any of such animals herded or found grazing upon a highway or upon private property, without the consent of the owner thereof shall be deemed and held to be estrays and animals running at large within the meaning of the act. "But nothing herein shall be construed so as to deprive any person of the rights to sue for damages for trespass by such animals."[10] Under this statute an owner of land is not required to fence against his neighbor's cattle, and if the owner of cattle allowed them to stray upon the land of another, he is responsible for the damage done, whether the land is fenced or not. This statute gives to the owner of unfenced land the same remedy against trespassing animals of known ownership, that had theretofore been given only against estrays of unknown ownership. Consequently, its effect is to abolish the fence law in so far as it relates to Santa Clara County, and to revive the common-law rule there.[11]

9. Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307. To same effect, see Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329. See, also, Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600 (holding the statutes constitutional).

10. Act March 27, 1872, Stats. 1871–72, p. 580, amending act April 27, 1863, as amended by act February 20, 1864, Stats. 1863–64, p. 98.

11. Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329.

This act has been followed by other local statutes having the same effect in the following counties: San Diego,[12] Fresno, Tulare, Kern, Ventura and Monterey,[13] San Benito,[14] Inyo,[15] Marin and Mono,[16] Napa,[17] Butte,[18] Sutter,[19] Yolo,[20] Stanislaus,[1] Placer,[2] Alpine, Colusa, Humboldt, Merced, Solano, Santa Barbara, San Joaquin, San Luis Obispo, Sacramento and Los Angeles, and portions of San Bernardino, El Dorado and Tehama Counties.[3] In addition to these acts, one

12. Stats. 1875–76, p. 458 (repealing Stats. 1871–72, p. 99), amended by Stats. 1877–78, p. 245.

13. Stats. 1873–74, pp. 50, 179; Hanley v. Sixteen Horses, etc., 97 Cal. 182, 32 Pac. 10 (as to effect upon this act of the act of 1878 [Stats. 1878, pp. 176, 878]); Zumwalt v. Dickey, 92 Cal. 156, 28 Pac. 212 (Tulare County); Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385 (Tulare and Fresno Counties); Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384 (Monterey County); De la Guerra v. Newhall, 53 Cal. 141 (Ventura County); Gonzales v. Wasson, 51 Cal. 295 (as to effect of act on liability of owner of adjoining land to pay for his proportion of division fence. See FENCES); Davis v. Blasingame (Cal. App.), 181 Pac. 104 (Fresno County). See Stats. 1875–76, p. 373, providing an additional remedy in Fresno County. See the following cases, Sutherland v. Sweem, 53 Cal. 48; Young v. Wright, 52 Cal. 407 (holding this act unconstitutional in so far as it attempts to authorize a justice of the peace to enforce a lien).

14. Stats. 1873–74, p. 474.

15. Stats. 1873–74, p. 824. See Stats. 1871–72, pp. 99, 668.

16. Stats. 1875–76, p. 5, amending Stats. 1865–66, p. 440.

17. Stats. 1873–74, p. 705.

18. Stats. 1873–74, p. 310, amended in Stats. 1875–76, p. 314 (portions of Butte). See Butte County v. Boydston, 64 Cal. 110, 29 Pac. 511.

19. Stats. 1875–76, p. 373.

20. Act March 20, 1878, Stats. 1877–78, p. 360; Martin v. Jacobs, 2 Cal. Unrep. 282, 3 Pac. 122.

1. Stats. 1877–78, p. 164.

2. Stats. 1875–76, p. 542 (in certain townships).

3. Stats. 1877–78, pp. 176, 878, amended Stats. 1919, p. 524; Stats. 1862, p. 214; Stats. 1863–64, p. 448 (prohibiting hogs from running at large in Solano County); Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600 (Santa Barbara County); Hanley v. Sixteen Horses, etc., 97 Cal. 182, 32 Pac. 10 (Santa Barbara County); Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224 (Los Angeles County); Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307 (applying the statute to the county of Colusa and holding the effect of this act, so far as it concerns the counties to which it is applicable, is to repeal the acts concerning lawful fences (Stats. 1850, p. 131) to regulate rodeos (Stats. 1851, p. 445), and concerning judges of the plains (Stats. 1851, p. 515) and to restore the common law in these counties); Dooley v. Seventeen

statute gave certain counties an election whether to be governed by the common-law rule.[4]

This was the state of the law at the time of the adoption of the constitution of 1879. These local acts were not repealed by that constitution, as they are not inconsistent with any provision thereof. Furthermore, the constitution expressly provides that all laws in force at the time of its adoption, not inconsistent therewith, shall remain in full force until altered or repealed by the legislature.[5] Neither have these acts been repealed by the Trespass Act of 1907,[6] nor by the Estray Acts of 1897, 1901 and 1915, except perhaps to the extent that they relate to estrays.[7]

§ 22. Revival of Common-law Rule Since 1879.—After the adoption of the Constitution of 1879, no special laws were enacted and the law concerning trespassing animals in force in 1879 contiuned without change until the enactment of Estray Acts in 1897,[8] 1901,[9] and

Thousand Five Hundred Head of Sheep, 4 Cal. Unrep. 479, 35 Pac. 1011 (San Luis Obispo County); Faber v. Cathrin, 2 Cal. Unrep. 268, 2 Pac. 879 (probably El Dorado County).

Santa Barbara and San Luis Obispo Counties were included in the act of 1874 [Stats. 1873–74, p. 50], and also in the subsequent act of March 7, 1878 [Stats. 1877–78, pp. 176, 878]. The two acts are conflicting in many points, and it follows that the former act is repealed by the latter, so far as it relates to Santa Barbara and San Luis Obispo Counties, though there are no express words in the latter act repealing the former by name. Hanley v. Sixteen Horses etc., 97 Cal. 182, 32 Pac. 10; Hilton v. Hanly (Cal.), 32 Pac. 11. Though the court does not limit its language to these two counties, but states broadly that the act of 1874 has been repealed, the latter act has since been recognized as being in full force as to the other counties named therein. See Davis v. Blasingame (Cal. App.), 181 Pac. 104.

4. Stats. 1871–72, p. 563; Chase v. Putnam, 117 Cal. 364, 49 Pac. 204 (applying statute to Contra Costa County).

5. Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, under § 1 of art. XXII of the constitution of 1879.

6. See infra, § 25.

7. See infra, § 22.

8. Stats. 1897, p. 198.

9. Stats. 1901, p. 603, amend. Stats. 1907, p. 132; Stats. 1909, p. 1079. In Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, the court says: "We are not impressed with the suggestion that the estray law of 1901, either in its original draft or as amended by the legisla-

1915.[10] The act of 1915, unlike the acts of 1897 and 1901 as originally passed, authorized an owner of unfenced lands to take up estrays, both when the owner is unknown, and when he is known, and requires the giving of personal notice to the owner or custodian of the animal when known.[11] Consequently, like the Santa Clara act already referred to, the Estray Act of 1915 gives an owner of unfenced lands the same remedy against trespassing animals of known ownership, that formerly was given against animals of unknown ownership, and has the effect of restoring the common law in the entire state, with the exception of the six counties specifically named therein, to wit, Trinity, Shasta, Del Norte, Siskiyou, Lassen and Modoc. It is true the statute does not specifically repeal the fence laws and acts concerning trespassing animals, but it expressly saves the fence laws so far as they relate to the six counties named, thereby raising an implication of the repeal of those acts as to the counties not named.[12]

In 1919, it was enacted that it is unlawful for any person to herd or graze livestock on the lands of another in the counties of Plumas, Lassen and Modoc, without having first obtained the consent of the owner of the land.[13] And at the same session of the legislature, an act was passed which authorized any county, except the six named in the act of 1915, to restore the fence law, if at an election a majority of the electors declare in favor thereof.[14] These Estray Acts of 1897, 1901, and 1915 do not repeal the local acts restoring the

ture of 1909, had the effect of reviving the common-law rule as to trespassing animals in California." This statement was disapproved and held to be dictum in Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100.

10. Stats. 1915, p. 636.

11. The amendments to the act of 1901 required such notice also. See Stats. 1907, p. 132; Stats. 1909, p. 1079.

12. Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100; Moran v. Freeman (Cal. App.), 192 Pac. 155 (holding that it is now definitely determined that the Estray Act of 1915 repeals all fence laws except in the six counties specified in the text). See supra, § 20, as to earlier rule in California.

13. Stats. 1919, p. 464. This act does not apply to any livestock running at large on the ranges or commons.

14. Stats. 1919, p. 1150.

common law in particular counties, so far as they forbid the trespassing of animals upon private property and allow an action of damages therefor, as the district court of appeal, subsequent to these general estray acts, has in three instances applied the local acts so as to uphold actions for damages and to enjoin trespasses.[15] But it is probable that these local acts have been repealed in so far as they are estray acts.[16]

§ 23. Rule Under Fence Laws.—The rule as to animals running at large, in those counties not affected by statutes reviving the common law is declared in the fence law of 1855,[17] by an act of 1907 concerning trespassing animals upon private lands,[18] and by some local acts,[19] and acts relating to the herding of particular animals.[20] The Fence

15. Davis v. Blasingame (Cal. App.), 181 Pac. 104 (decided in 1919, under the act of 1874 [Stats. 1873–74, p. 50]); Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224 (decided in 1916); Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, decided in 1913 under the act of 1878 [Stats. 1877–78, p. 176], and referring to Stats. 1901, p. 603, and its amendment [Stats. 1909, p. 1079]. See, also, Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100. See, however, index to Laws, 1908, 878 et seq., prepared according to Stats. 1907, p. 572, Davis, commissioner, in which several of the local acts are said to be repealed or superseded by the Estray Acts.

16. See Blanchard v. Scarpa (Cal. App.), 187 Pac. 29, which applied the Estray Act of 1901 to Santa Clara County. See, generally, STATUTES.

17. Stats. 1855, p. 70, which amended the original fence law of 1850 [Stats. 1850, p. 131], by substantially re-enacting section 1, and by changing the rule respecting the injuring of trespassing animals on inclosed land. The act of 1855 undoubtedly repealed that of 1850, though the legislature seems to have overlooked this fact in 1915, when it enacted the Estray Act, for the saving clause of that act continues the act of 1850 in force in the six counties therein named.

18. See infra, § 25.

19. Stats. 1859, p. 279, concerning lawful fences in San Bernardino, Colusa, Shasta, Tehama and Placer Counties. This statute was expressly recognized as continuing in force in Stats. 1915, p. 636, § 10, as to Shasta County. But it was repealed as to the other counties by local statutes and by the act of 1915 referred to.

This act of 1859 was not repealed by an act of 1861 [Stats. 1861, p. 523], restricting the herding of sheep. Logan v. Gedney, 38 Cal. 579.

20. Stats. 1861, p. 523, amended Stats. 1867–68, p. 426; Stats. 1865–66, p. 56 .(restricting the herding

Act of 1855 provides that if any horses, mules, jacks, jennies, hogs, sheep, goats or any herd of neat cattle shall break into any grounds, inclosed by a lawful fence, the owners or manager of such animals shall be liable to the owners of said inclosed premises for all damages sustained. If the trespass is repeated by neglect of the owner or manager of such animals, he shall for the second and every subsequent offense or trespass be subject to double damages.[1] Under this act, an owner of cattle is allowed the free and voluntary ranging of cattle over and upon uninclosed land, whether public or private,[2] and he is not liable for damages done by his cattle breaking into the close of another, unless the grounds are inclosed by a lawful fence of the description prescribed in the statute, or equivalent to that described in the statute in its capacity to exclude cattle,[3] or unless he willfully drives them to and collects them upon the uninclosed lands of another.[4] In other words,

of sheep. This act was probably repealed by Stats. 1897, p. 198, in so far as it authorizes the taking up of the sheep); Stats. 1862, p. 490, restricting the herding of sheep in the counties of Mendocino, Lake, Sonoma and Marin; Stats. 1871–72, p. 510 (hogs running at large in Amador County); Logan v. Gedney, 38 Cal. 579 (under the act of 1861 which makes it unlawful for any person or persons owning or having charge of any sheep, to herd the same, or permit them to be herded on the land or possessory claim of other than the land or possessory claims of the owners of such sheep, it is the personal, direct, aggressive, and violative act of the party or his agent in driving his sheep to and collecting them on the lands of another that is prohibited. For this act the party is made liable in double damages when the trespass is repeated. But when the sheep stray on to uninclosed land without the knowledge or consent of their owner, there is no liability under this act). See Demartin v. Albert, 68 Cal. 277, 9 Pac. 157, holding a reference to the act of 1861 in a pleading to be surplusage; Fay v. Lawler, 1 Cal. Unrep. 294, holding evidence justified verdict in an action under the act of 1862.

1. Stats. 1855, p. 70, amending Stats. 1850, p. 131.

2. Logan v. Gedney, 38 Cal. 579; Richmond v. Sacramento Valley R. R. Co., 18 Cal. 351; Comerford v. Dupuy, 17 Cal. 308; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561.

3. Merritt v. Hill, 104 Cal. 184, 37 Pac. 893; Comerford v. Dupuy, 17 Cal. 308, citing New York & E. Co. v. Skinner, 19 Pa. 298, 57 Am. Dec. 654; Knight v. Albert, 6 Pa. 472, 47 Am. Dec. 478.

4. Logan v. Gedney, 38 Cal. 579 (holding that the act of 1861 restricting the herding of sheep made

an owner of cattle is not responsible in damages, if his cattle, while ranging at large, stray on to the uninclosed lands of another, without the agency, knowledge or consent of the former.[5] If the land trespassed upon is inclosed by a lawful fence, the owner or occupant of the land may recover damages in an action therefor,[6] or he may take up the cattle and obtain restitution under the estray laws.[7] But he is not obliged to take them up. He may drive them off.[8] In that event, it is the duty of the owner of the cattle to take care of them. He cannot refuse them all care, and then on their perishing from his neglect, or otherwise, recover their value from the person turning them from the premises. Even if the occupant of the land is not entitled to the possession of the land and is guilty of a trespass, he would not be liable, where it does not appear that the loss was the direct consequence of his acts.[9]

§ 24. Rule Under "No Fence" Laws. — The various statutes, which have been construed to be a re-enactment of the common-law rule of trespassing animals, frequently provide in substance that it is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal. By this rule, it is not the duty of one to fence his land against the cattle of his neighbor. On the contrary, every man is bound to keep his beasts within his own close under penalty of answering in dam-

the party liable in double damages for acts for which he is liable in single damages in the absence of statute). See Merritt v. Hill, 104 Cal. 184, 37 Pac. 893, where the court says: "It is not alleged that the trespasses were instigated by the defendants [the owners of the cattle] nor that they had notice thereof."

5. Logan v. Gedney, 38 Cal. 579.

6. Fisch v. Nice, 12 Cal. App. 60, 106 Pac. 598, holding that independently of the act of 1907 [Stats. 1907, p. 999], one may recover the value of hay or other property upon inclosed land, whether the land is his own or that of another. See infra, § 32.

7. See infra, § 27.

8. See 1 Ruling Case Law, 1103, § 46. See infra, § 44, as to injuring cattle when driving them off.

9. Story v. Robinson, 32 Cal. 205.

ages for all injuries resulting from their being permitted to trespass on the land of another.[10] It is immaterial, whether the land trespassed upon is inclosed or uninclosed,[11] for the word "close" is purely technical, and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land.[12] Since, under such laws, there is no duty resting on the occupant of the land to maintain fences, the fact that he does not keep a fence inclosing the land in repair, or fails to keep the gates closed, does not preclude his recovery for the damage sustained.[13] If beasts have roving and destructive propensities, it is the owner's duty to take commensurate precautions to prevent their escape on the range upon which they are placed. Reasonable care on account of their known disposition requires the exercise of greater diligence concerning them than is required relative to ordinary range cattle.[14] While under this rule an owner of cattle is liable when his cattle trespass on the land of another, he is, on the other hand, entitled to at least nominal damages, if they are excluded from land where he has a right to have them.[15]

10. Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329; Meade v. Watson, 67 Cal. 591, 8 Pac. 311; Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224; Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307; Faber v. Cathrin, 2 Cal. Unrep. 268, 2 Pac. 879. See, also, Logan v. Gedney, 38 Cal. 579; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561.

11. Hahn v. Garratt, 69 Cal. 146, 10 Pac. 329; Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224 (under Stats. 1877–78, pp. 176, 878); Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307 (under Stats. 1877–78, pp. 176, 878). See, also, Zumwalt v. Dickey, 92 Cal. 156, 28 Pac. 212 (under Stats. 1873–74, p. 50); Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385 (under Stats. 1873–74, p. 50); Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384 (under Stats. 1873–74, p. 50).

12. Meade v. Watson, 67 Cal. 591, 8 Pac. 311.

13. Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224.

14. Durkee v. Chino Land & Water Co., 151 Cal. 561, 91 Pac. 389, holding evidence sustained a finding of negligence on the part of the defendant.

15. Treadway v. James, 57 Cal. 137. See, as to driving cattle from inclosed lands, infra, § 44.

§ 25. Trespasses on Inclosed Lands Planted to Crops. In 1907, a statute was enacted making it unlawful for anyone owning, or having possession, of any animal, to suffer or permit such animal to break into and enter upon any land of another which is planted to growing crops, vines, fruit trees or vegetables, and is at the time entirely inclosed by a substantial fence or other inclosure. The owner or occupant is authorized to recover his damages in a court of competent jurisdiction, and, to allow him better security for the payment of any judgment recovered, it is provided that he may have an attachment without the filing of an affidavit of attachment, and that no animal shall be exempt from attachment or execution to satisfy a judgment for trespass committed by such animal.[16]

This statute is not repugnant to or inconsistent with the common-law rule relating to trespassing animals, but it is itself the common-law rule as applied or limited to certain special cases, namely cases where the land is inclosed and is planted to crops, vines, fruit trees or vegetables. It has been said that the remedy so provided by the statute is neither summary nor extraordinary. It is the plain, ordinary remedy for the recovery of damages for trespass upon lands embraced by it, with added features to afford the plaintiff better security for the payment of any judgment he may recover.[17] It is a general rule that the act of 1907 does not operate to repeal statutes reviving the common-law rule in certain counties.[18] It has been held that this statute is applicable only to those counties in which the common-law rule is not in force, and has for its purpose the providing of a remedy for trespasses which, in its scope, is limited according to the requirements of existing conditions in those counties. While it might be

16. Stats. 1907, p. 999.

17. Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307.

18. Montezuma Imp. Co. v. Simmerly (Cal.), 189 Pac. 100; Davis v. Blasingame (Cal. App.), 181 Pac. 104; Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224; Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307.

argued that the act was intended to establish a general rule for the whole state, it is not clear from its wording that this was the legislative intent.[19]

Impounding Estrays, Trespassing Animals and Animals Running at Large.

§ 26. Estrays and Trespassing Animals Distinguished. Properly speaking, there is a clear-cut distinction between estrays and trespassing animals, the former including only wandering domestic animals with unknown owners, and the latter animals with known owners.[20] The term "estray" is, however, sometimes used in a broader sense to include trespassing animals with known owners. This use was recognized in the early estray law of 1851, which provided that no animal should be considered an estray if the owner is known to the person finding it.[1] Later estray acts treated estrays and trespassing animals alike and gave the same remedy against each. But the present act, while relating to both and giving the same remedy against each, clearly distinguished between them, by requiring a different notice in case the owner is known, than is required when he is unknown.[2] Under a statute forbidding the pasturing of stock upon a public highway, and authorizing the taking up of such stock,[3] or a statute declaring animals herded or found grazing on a highway to be estrays whether accompanied by a herder or not,[4]

19. Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307.

20. Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100.

1. Act May 1, 1851 [Stats. 1850–53, p. 854].

2. See Stats. 1915, p. 636. In the act of 1901 as amended in 1909 [Stats. 1909, p. 1079], and incorporated by reference in the act of 1919 [Stats. 1919, p. 1150], it is provided that: "The word 'estray' as used in this act is intended to include all domestic animals which have strayed upon, or been found upon, lands other than those of their owner, or the public domain, or lands whose owner (or to which the person in possession thereof), has consented, may be passed over, or allowed to be entered on, by such animal."

3. Stats. 1873–74, p. 464, an act concerning roads and highways in Santa Clara County.

4. Stats. 1871–72, p. 580, an act concerning estrays in Santa Clara County.

it is apparent that cattle passing over or along a public road in charge of a herder, and not being on the road for the purpose of being pastured there are not estrays within the meaning of the statute. Nor do cattle so passing along a highway in charge of a herder become estrays because they should, in passing, casually eat the grass growing at the roadside, or because the herder may have fallen asleep for the moment and the cattle are found pastured on both sides of the road.[5]

§ 27. Right to Distrain and Impound. — Among the private wrongs, which, at common law, might be redressed by the mere act of the party injured, was that occasioned by animals of another, taken damage feasant, that is, doing hurt or damage to the party by treading his grass and the like.[6] The Estray Act of 1851 authorized anyone finding an estray to take it up, to make report of the fact to a justice of the peace, and upon a prescribed procedure have from its sale, or from the owner, the finder's costs.[7] But inasmuch as the common-law rule of trespassing animals did not prevail in this state, an owner of land was not authorized to distrain trespassing animals with known owners until the act of 1855 gave him the right to do so, as to animals trespassing on fenced lands. This act authorized the distrainer to post the animals under the estray laws and to recover for all damages done by them, as well as the expense of keeping and posting them.[8] The Estray Act of 1851 is superseded by the present estray acts.[9] But the act of 1855 is still in force in the counties in which the common-law rule

5. Thompson v. Corpstein, 52 Cal. 653.

6. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204.

7. Act May 1, 1851, Stats. 1850–53, p. 854.

8. Stats. 1855, p. 70.

9. Stats. 1915, p. 636; Stats. 1919, p. 1150. See Stats. 1859, p. 149, an act to prevent stallions running at large, amend Stats. 1860, p. 107; Stats. 1865–66, p. 327; Stats. 1869–70, p. 68; Stats. 1873–74, p. 228. Perhaps repealed by estray law of 1897, Stats. 1897, p. 198. Stats. 1871–72, p. 580, concerning estrays in Santa Clara County, probably repealed by Stats. 1897, p. 198.

does not prevail.[10] The act of 1915 prevails in the remaining counties, other than such as may be governed by special acts still in force,[11] or, by an election, may have decided to be governed by the act of 1919.[12]

By the act of 1915, any person finding any estray animal, whether the owner is known or unknown, upon his premises, or the premises to which he has the right of possession, whether fenced or unfenced, or upon highways adjacent thereto, may take up the same and have a lien thereon for all expenses incurred and costs in keeping and caring for such animals.[13] The act of 1919 is substantially the same as the act of 1915, except that the word "premises" as used therein means land entirely inclosed with a good substantial fence, and does not apply to unfenced lands.[14] Under an act authorizing the taking up of animals found trespassing upon the premises of any person, it is necessary, as at common law, that the animals be taken up while damage feasant on the land of the person taking them up.[15]

§ 28. **Constitutionality of Statutes.** — Statutes merely authorizing animals damage feasant to be impounded until the damage they have committed, and the cost of keeping them shall be paid, are not unconstitutional as in violation of the provision against taking property without due process of law. The temporary seizure and holding of the property awaiting judicial action is not a bereaving or a divesting of the owner of his property and is not forbidden. Property may be attached and held to be disposed of by judicial action and judgment

10. See Stats. 1915, p. 636, § 10. This statute continues in force the act of March 30, 1850, concerning lawful fences. The legislature undoubtedly overlooked the fact that this act was amended in 1855. See, also, Pol. Code, § 19.

11. See supra, §§ 21, 22.

12. See supra, § 22.

13. Stats. 1915, p. 636, § 1. See Martin v. Jacobs, 2 Cal. Unrep. 282, 3 Pac. 122, under Stats. 1877–78, p. 360.

14. Stats. 1919, p. 1150, § 2.

15. Kusel v. Sharkey, 46 Cal. 3, under the act of March 26, 1857 [Stats. 1857, p. 106], relating to trespassing hogs in certain counties. Repealed in 1858 [Stats. 1858, p. 79].

by such process, or by such agents without process, as the legislature may direct. It is within the province of the legislature to regulate the remedies for trespass on lands, and it is not in excess of legislative power to give to the party injured a lien upon the animals found trespassing.[16] As to the further question, whether the legislature has power to authorize an officer without any proceedings at law to sell animals taken damage feasant, and apply the proceeds to the payment of damages and costs, California courts have several times raised the question, but they have not as yet decided it.[17]

§ 29. **Rights of Parties and Lien of Distrainer.**—The estray laws give a lien on animals taken up by virtue of their provisions for all expenses incurred and costs in keeping and caring for such animals taken up, with a right of possession until the owner of the stock tenders the amount to which the distrainer is entitled under the statute,[18] or if such tender is not made, for such time as the statute prescribes. While in possession of the animals, the distrainer may not work or use them.[19] He is required to use reasonable care to preserve them from injury, but if they die or escape from his possession he is not liable for damages.[20] The owner of the animals may contest the distrainer's right to retain possession of them by an action of replevin.[1] But when he is dissatisfied with the amount charged for costs and expenses, he is required by the statute to tender the proper amount to the dis-

16. Rood v. McCargar, 49 Cal. 117; Cook v. Gregg, 46 N. Y. 439.

17. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204; Rood v. McCargar, 49 Cal. 117; Trumpler v. Bemerly, 39 Cal. 490. As to rule in other jurisdictions, see 1 Ruling Case Law, 1142, 1145.

18. Blanchard v. Scarpa (Cal. App.), 187 Pac. 29. See Rood v. McCargar, 49 Cal. 117, under the act of March 26, 1857 [Stats. 1857, p. 106], since repealed.

19. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204, quoting 3 Black. Com. 14.

20. Stats. 1915, p. 636, § 8.

1. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204; Thompson v. Corpstein, 52 Cal. 653; Rood v. McCargar, 49 Cal. 117; Kusel v. Sharkey, 46 Cal. 3.

trainer before suing to recover possession of the animals.[2] If such tender is not made before action brought, the owner is not entitled to the possession of his animals at the time of bringing his action, unless the distrainer has waived his right to insist on his lien.[3] The statute which creates the lien does not, however, undertake to keep it alive indefinitely. The distrainer may hold the property for thirty days after giving the notice prescribed by law, and then if it is not redeemed, he must notify the proper officer who shall proceed to sell it. And in accordance with the general rule that one having a mere lien waives his right thereto by asserting a claim other than that of lien, such as a claim of ownership, it has been held that a distrainer is deemed to have waived or lost his lien, if he claims ownership of the animals distrained under a void sale, and on that ground refuses to deliver them.[4]

§ 30. **Enforcement of Lien.** — By the common law, animals when taken damage feasant were held by the distrainer as security to compel satisfaction. He could not sell them and could only hold them until the owner made satisfaction or contested his right thereto by a replevin. As was said by Blackstone: "This kind of distress, though it puts the owner to inconvenience, and is, therefore, a punishment to him, yet, if he continues obstinate and will make no satisfaction of payment, it is no remedy at all to the distrainer."[5] California statutes, like those of most, if not all, the states, supply this defect of the common law, and prescribe a method by which the distrainer may foreclose his lien.[6] The remedy afforded by the statute is speedy and summary,[7] and the statutes, as all others prescribing modes

2. Stats. 1915, p. 636, § 4; Stats. 1901, p. 603, § 4.

3. Blanchard v. Scarpa (Cal. App.), 187 Pac. 29.

4. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204. See Blanchard v. Scarpa (Cal. App.), 187 Pac. 29, holding the evidence disclosed no waiver. See LIENS.

5. 3 Black. Com. 14, quoted in Chase v. Putnam, 117 Cal. 364, 49 Pac. 204.

6. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204. See Civ. Code, §§ 3051, 3052.

7. Chase v. Putnan, 117 Cal. 364, 49 Pac. 204.

by which a party may be divested of his property without his consent, must be strictly construed.[8] It is necessary that a party who claims to have acquired a right and title to property by virtue of its provisions as against the original owner, affirmatively allege and prove that the mode prescribed by statute for the acquisition of such title, has, in every particular, been strictly followed.[9] A failure to follow the statute renders a sale of the animal void. Thus, a sale is void and passes no title if the period intervening between the filing of notice with the recorder, and the advertising of the animals for sale is less than that fixed by the statute.[10] So, also, the sale is void when the notice of sale is not given for the statutory period.[11] In either case, the owner of the animals may recover possession of them from the purchaser by an action of replevin.[12]

Under the Estray Act of 1915 two methods of giving notice of the taking up of such animals are provided. One is by filing a prescribed written statement with the recorder or poundkeeper, and, in certain cases, by publishing said statement in a newspaper. The other, which applies only to cases in which the finder knows the owner or person having charge of the animal or animals, requires the statement to be served upon the owner or custodian.[13] In this particular the act differs essentially from the act of 1901 and its predecessors, which either applied only to "estrays," properly speaking (that is, animals without known owners), or to estrays and trespassing animals with known owners, treating all alike and providing for no special notice to known owners.[14]

8. Trumpler v. Bemerly, 39 Cal. 490.

9. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204; Trumpler v. Bemerly, 39 Cal. 490.

10. Trumpler v. Bemerly, 39 Cal. 490, where only nineteen days elapsed, and the statute required that twenty elapse.

11. Chase v. Putnam, 117 Cal. 364, 49 Pac. 204.

12. See supra, § 29.

13. Stats. 1915, p. 636.

14. Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100.

§ 31. Animals Running at Large. — Ordinances prohibiting the running at large within the limits of towns and cities of horses, cows, sheep, hogs, and other useful domestic animals, and authorizing their impounding when found so running at large, and even their sale, if not redeemed, have been enacted by some cities and towns. Such ordinances, while perhaps restricting to some extent the ownership of such animals within the limits of such cities and towns, are upheld as a wholesome exercise of police power.[15] The purpose of such ordinances is the regulation of the use and management of the animals, rather than the restriction of or interference with ownership.[16] "Running at large" within the meaning of such ordinances, means strolling without restraint, or confinement, or wandering, roving, or rambling at will unrestrained.[17] Animals which are in charge of and are being herded by a competent person are not "running at large" within the meaning of such an ordinance. Even when the herder is a boy, the animals are not "running at large," when it is shown that he is competent to control them.[18]

Recovery of Damages and Enjoining Trespass.

§ 32. Recovery of Damages in General.—An owner or person in lawful possession of land which has been unlawfully trespassed upon by animals belonging to another may recover his damages in a civil action for trespass.[19] As has already been seen, he may, in those counties in which the common-law rule does not prevail, maintain such an action only when his land is fenced.[20] In other counties, he may maintain such an action, whether or not his land is fenced.[1] The various local acts restoring the common-law rule in particular counties, invariably provide that

15. See CONSTITUTIONAL LAW.

16. In re Ackerman, 6 Cal. App. 5, 91 Pac. 429. See Pol. Code, § 4408, subd. 9, authorizing city councils to regulate the keeping and use of animals.

17. See 1 Ruling Case Law, 1149.

18. Speet v. Arnold, 52 Cal. 455.

19. Martin v. Jacobs, 2 Cal. Unrep. 282, 3 Pac. 122.

20. See supra, §§ 20, 23.

1. See supra, § 24.

the party injured may maintain an action for damages.[2] On the other hand, the Estray Act, which restored the common law to those counties not covered by special acts, does not prescribe any damages collectible for injury done, but merely provides a scale of payment to the distrainer of trespassing animals for his expenses in caring for them.[3] It is a general rule that statutes of this character provide a special remedy by action against property in rem, and they do not purport to exclude the right of the owner of the land to proceed by personal action against the owner of the stock. In other words, in such cases the stock may be distrained damage feasant, or the ordinary action for the actual damage suffered by the owner of the land may be brought.[4] Under the act of 1874, there is no right to bring an action of damages, if the owner or occupant of the land has availed himself of the summary remedy therein provided for. And since a party injured by a continuous trespass is not authorized to divide it up into several causes of action, he cannot divide the animals trespassing on his land into parcels, and maintain distress proceedings as to a part and an action of trespass as to the remainder.[5] Where a limitation is fixed by the statute only to the remedy in rem, the person injured is not restricted to the period of the limitation in which to bring an action for damages.[6] Upon the same principle, the plaintiff in his action is not confined in his proofs to trespasses committed by the defendant's cattle within a similar period prior to the commencement of his action.[7]

2. See supra, § 21, where the local acts are cited.

3. See Stats. 1915, p. 636.

4. Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384; Moran v. Freeman (Cal. App.), 192 Pac. 155. And see Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100 (holding that such statutes do not prevent a land owner from enjoining recurring trespasses). As to action in rem, see infra, § 35.

5. De la Guerra v. Newhall, 53 Cal. 141.

6. Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384; Davis v. Blasingame (Cal. App.), 181 Pac. 104.

7. Zumwalt v. Dickey, 92 Cal. 156, 28 Pac. 212; Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385.

§ 33. **"Lawful Possession" of Plaintiff.**—The various acts relating to trespassing animals usually provide in substance that the owner of or person who is in the lawful possession of any land trespassed upon by animals is entitled to recover, by action, the damages sustained thereby.[8] The "lawful possession" mentioned in these statutes means only peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious but actually so.[9] A lessee of land is in lawful possession within the meaning of the statute. And when by the terms of a lease, the lessee agrees to harvest the crops at his own expense and in due and proper time give the landlord a certain proportion, the lessee and the landlord do not become owners in common of the crops. The tenant is the owner and may recover the entire damage sustained. The landlord has no claim upon the crop until an actual division is made and his share is turned over to him as rent.[10] Though the act authorizes an action by one lawfully in possession of land, the fact of possession is a mere incident and not the basis of the action. Therefore, the action does not involve the right to possession of real property within the meaning of the provision denying a justice of the peace jurisdiction of actions involving the possession of real property.[11]

§ 34. **Proceedings in Action.**—When suing for damages for injuries caused by trespassing animals, the owner or occupant of the land must allege a cause of action in accordance with the general rules governing actions of trespass.[12] Under the fence laws in general, a complaint is sufficient which shows actual possession by the plaintiff of certain land and premises inclosed by a good and sub-

8. See Stats. 1907, p. 999, § 2, and the various local acts cited in § 21.

9. Fisch v. Nice, 12 Cal. App. 60, 106 Pac. 598, quoting Michau v. Walsh, 6 Mo. 346.

10. Hicks v. Butterworth, 30 Cal. App. 562, 159 Pac. 224.

11. Fisch v. Nice, 12 Cal. App. 60, 106 Pac. 598. See, also, Pollock v. Cummings, 38 Cal. 683. See JUSTICES OF THE PEACE.

12. See cases cited infra; and generally, see TRESPASS.

stantial inclosure, and an unlawful entry thereon by the defendant with cattle, with which he, against the consent of the plaintiff, depastured the land to plaintiff's damage.[13] Under the act of 1907, it is necessary to show also that the land was planted to crops, vines, fruit trees, or vegetables.[14] If the complaint is otherwise sufficient, its sufficiency is not affected by an allegation that the trespasses alleged were contrary to other statutes. Such an allegation is surplusage, and may be stricken out on motion, or, in the absence thereof, disregarded.[15] As tending to show the extent of his injury, the plaintiff may prove that, by reason of the trespass, it was necessary for him to feed his stock with hay.[16] It has been held that, since the action is in form ex delicto, it is error for the court to give an instruction as to the implication of a promise on the part of the owner of the stock to pay whatever damages may have been sustained by the trespass.[17] While damages for injury done by cattle not belonging to the defendant cannot be awarded, the evidence of the presence of other cattle may be so indefinite and uncertain, that the court may be warranted in finding that the damage caused by such cattle is too trivial and inconsequential to affect the substantive damage caused by the continuous trespassing of the defendant's cattle.[18]

§ 35. **Action in Rem.**—The act of 1878 provides that when the owner of trespassing animals is not known, the animals shall be liable for the damage done, and the party injured may bring an action in rem directly against the trespassing animal or lot of animals trespassing at the same or different times, whether of the same or different marks or brands.[19] The act further provides

13. Demartin v. Albert, 68 Cal. 277, 9 Pac. 157.

14. Stats. 1907, p. 999.

15. Demartin v. Albert, 68 Cal. 277, 9 Pac. 157.

16. Faber v. Cathrin, 2 Cal. Unrep. 268, 2 Pac. 879.

17. Van Valkenburg v. McCauley, 53 Cal. 706.

18. Durkee v. Chino Land & Water Co., 151 Cal. 561, 91 Pac. 389. See infra, § 35.

19. Stats. 1877–78, p. 176, § 5.

that the person injured "may at his option, distrain and take into his possession any trespassing animal . . . and keep the same two days without instituting legal proceedings under this act," so that he may have proper time in which to make the necessary inquiries as to the ownership of the animals and determine which remedy he is entitled to.[20] Construing a similar statute authorizing the bringing of the action in a justice's court, it was held that it plainly appears that the distrainer is to have a lien on the animals for his damages and the cost of keeping, and though the action to enforce the lien is designated a proceeding in rem and is so in form, it is in substance and effect a proceeding in equity to enforce the lien. Thus construed, the statute was held void, as an attempt to confer equitable powers on a justice of the peace.[1] This objection was eliminated in the act of 1878. The right to distrain given by this act is an option given the land owner which he may exercise without instituting any legal proceedings whatever. But this right is limited to two days, at which time he must commence his action and he can then attach the animals in whichever form of action he brings. His detention then expires, and the animals are in the custody of the law under the attachment only.[2] Although the action may be brought

20. Act March 7, 1878; Stats. 1877–78, p. 176. Hanley v. Sixteen Horses, etc., 97 Cal. 182, 32 Pac. 10, holding that since this act authorized a proceeding in rem only in case the owner of the animals is not known, it is in conflict with the act of February 4, 1874 [Stats. 1873–74, p. 50] which authorized a proceeding in rem although the owner was known. Therefore, the act of 1878 repeals the act of 1874 so far as it relates to Santa Barbara and San Luis Obispo Counties, at least.

1. Young v. Wright, 52 Cal. 407, construing act of February 4, 1874 (Stats. 1873–74, p. 50).

2. In this view of the statute, it is not in conflict with the provisions of the code relating to attachment specifically made applicable to this proceeding, particularly section 537 of the Code of Civil Procedure, providing that in the case of a resident debtor it is a condition to the existence of a cause of action that will support an attachment that the demand be not secured by any mortgage or lien upon real or personal property, or pledge of personal property, etc. Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600.

against animals trespassing at the same or different times, whether they have the same or different brands, an owner is responsible only for damages done by his own cattle, not for those done by cattle over which he has no control. Consequently, in an action in rem against cattle bearing different brands in which an owner of certain of the cattle appears, the damages caused by his cattle should be distinctly found.[3]

§ 36. Enjoining Trespass.—An owner or occupant of land in those counties where the common law of trespassing animals has been restored, may obtain an injunction against the trespassing of animals, where the remedy at law is inadequate, as where the injury is irreparable, because the property destroyed, the herbage or feed, cannot be replaced so as to accomplish the immediate purpose for which it was being used, that of feeding the plaintiff's cattle, or where repeated acts of trespass necessitate a multiplicity of actions at law for damages. In the former case, where the injury is or would be irreparable, the trespass may be enjoined though it be a single act. In the latter case, where repeated acts of trespass are committed, an injunction may be granted, though each of the acts taken by itself may not be destructive, and the legal remedy may be adequate for each single act if it stood alone. The facts in a particular case may be such, that jurisdiction can be justly invoked on both grounds.[4] The right to an injunction, as has been seen, is unaffected by the fact that the Estray Act of 1915, which has been held to

3. Dooley v. Seventeen Thousand Five Hundred Head of Sheep, 4 Cal. Unrep. 479, 35 Pac. 1011, holding that a finding that defendant's cattle depastured all of plaintiff's land is not sustained by evidence showing that the defendant's cattle were on portions of plaintiff's land on certain days, and showing that other cattle were also upon his land, even where each and every acre of plaintiff's land was depastured.

4. Montezuma Improvement Co. v. Simmerly (Cal.), 189 Pac. 100, holding allegations in complaint sufficient to authorize an injunction; Blevins v. Mullally, 22 Cal. App. 519, 135 Pac. 307, quoting Pomeroy Eq. Juris., § 1357.

have the effect of reviving the common law throughout the state, does not prescribe any damages which may be collected for injury done, but merely provides a scale of payment for the expense of keeping animals taken up.[5]

VIII. Personal Injuries by Animals.

§ 37. Liability in General.—It is not unlawful for a person to keep wild or ferocious animals,[6] but it is the duty of one, who knows or is presumed to know, that animals kept by him are vicious, to guard them securely, and in such a manner as to prevent the occurrence of injury to others through such vicious acts as they are inclined to commit.[7] The responsibility of an owner or keeper of animals for injuries inflicted by them is the same whether the animal is a wild animal, or is a domestic animal known by its owner or keeper to be vicious; the only difference between the responsibility for injuries inflicted by wild animals and those inflicted by domestic animals being that in the former case, wild animals are presumed to be vicious,[8] and the owner is presumed to have knowledge of their mischievous disposition;[9] whereas in the latter case, it is necessary to prove that the animal was vicious, and that the owner or keeper knew it,[10] except, of course,

5. See supra, § 32.

6. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269 (vicious dog).

7. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, 23 L. R. A. (N. S.) 1071, 102 Pac. 819 (action for damages caused by bite of a camel); Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241 (injuries received by being scratched by a leopard).

8. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, 23 L. R. A. (N. S.) 1071, 102 Pac. 819.

9. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269 (vicious dog); Congress etc. Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487, see, also, Rose's U. S. Notes; cited in Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241 (deer).

10. Smith v. Royer (Cal.), 183 Pac. 660 (dog); Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293 (dog); Baker v. Borello, 136 Cal. 160, 68 Pac. 591 (kicking horse); Clowdis v. Fresno Flume etc. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373 (bull); Finney v. Curtis, 78 Cal. 498, 21 Pac. 120 (horse), holding that an instruction assuming the vicious character of an animal is erroneous; Roos v. Loeser (Cal. App.), 183 Pac. 204 (dog); Hane-

where the gist of the action is negligence.[11] However established, this knowledge is the same in substance and works the same results.[12] If, therefore, a domestic animal of peaceable disposition, while in charge of a master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible, if at the time he was in the exercise of due care.[13] But, conversely, the owner of such an animal knowing its vicious propensities is liable for injury inflicted by it upon property or upon the person of one who is free from fault,[14] for the reason that under such circumstances it is the duty of the owner to anticipate that such animals will commit such vicious acts as opportunity offers, and to guard against such acts.[15] He, like the owner of a wild animal, is an insurer of the acts of the animal to one who is injured without fault. He keeps the animal at his own risk,[16] and is liable irrespective of the question of negligence.[17] In either case, the gist of the action is the keeping of the animal with knowledge of its vicious propensities.[18] It is essential, of course, to liability in all such cases, as in actions for negligence generally, that the occurrence be

man v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695 (horse).

11. See infra, § 41.

12. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269 (dog).

13. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373 (bull).

14. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, 23 L. R. A. (N. S.) 1071, 102 Pac. 819 (camel); Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373 (bull); Roos v. Loeser (Cal. App.), 183 Pac. 204 (dog); Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695 (horse).

15. Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695 (horse).

16. Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293 (dog); Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373 (bull); Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269 (dog); Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241 (leopard).

17. Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293 (dog); Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373 (bull); Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241 (leopard).

18. Arthur v. Merchants' Ice & Cold Storage Co., 173 Cal. 646, 161 Pac. 121 (horse); Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241; Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695.

the efficient, proximate and producing cause of the injury or injuries complained of.[19]

A person may be not only civilly liable for injuries inflicted by an animal, but he is guilty of a felony if, knowing its mischievous propensities, he willfully suffers it to go at large, or keeps it without ordinary care, and the animal kills any human being who has exercised due precaution.[20]

§ 38. **Imputed Knowledge.**—Where an animal is possessed of a ferocious disposition, a servant's or agent's knowledge of such disposition is knowledge of the master, when the servant or agent is intrusted with or has charge or control of the animal.[21] But where a servant is charged with no duty in the matter, his knowledge of the vicious propensities of an animal owned by the master is not notice to the master.[1] Stated more fully, when knowledge of the ferocious disposition of a domesticated animal is brought home to an agent or servant employed about the animal, whose duty, as such agent or servant,

19. Lindley v. Knowlton, 179 Cal. 298, 189 Pac. 798 (where in an action by a husband and wife for damages on account of injuries alleged to have been sustained by the wife because of fright occasioned by the appearance in plaintiffs' home of a chimpanzee owned and negligently allowed to escape by the defendant, the animal attacking plaintiffs' children and being beaten off by the mother with great effort, damages were allowed for the injuries so sustained, and where it was held that physical injuries occasioned by fright caused by the negligence of another need not be contemporaneous with the fright to entitle to damages, and where it was held that the court's refusal to instruct the jury that no recovery might be had on account of fright produced by apprehended danger or peril to a third person was justified, where all the circumstances made it impossible that the mother should have been devoid of fear for her own safety, although she was also in fear for her children). See generally, NEGLIGENCE.

20. Pen. Code, § 399.

21. Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645; Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; Roos v. Loeser (Cal. App.), 183 Pac. 204; Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695. See AGENCY; MASTER AND SERVANT.

1. Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645; Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

requires him, if he knows of the vicious character of the animal, to act in respect thereof, toward third persons, or toward the animal, for the protection of third persons, such knowledge, though not imparted to the master, is imputed to him, in any matter involving a breach of such duty.[2] In accordance with this rule, when servants are put in complete charge of an animal, they stand in the performance of their task in the place of the master, and the test of responsibility is: What would have been the master's responsibility and liability had he personally been in charge of the animal?[3] It is immaterial however subordinate or menial may be the rank of the servant, for in that special employment he represents the master and within its scope, his knowledge is the master's knowledge, his acts the master's acts.[4] Thus, when an owner of horses keeps no responsible person in charge of his stables, and the foreman simply visits the stables occasionally, the knowledge of the stableman whose duty it is to feed and harness the animals is knowledge of the owner within the rule.[5]

§ 39. Contributory Negligence, and Representations of Owner as to Animal.—The general rule of law, which prevails in all actions for negligence, that the plaintiff cannot recover if his own negligence contributed to produce his injury, applies to actions for injuries inflicted by vicious animals. While the burden of the duty to exercise the highest degree of care rests upon the owner of an animal which is wild or known to be vicious, yet, he is exonerated from liability, if the injured party imprudently or negligently places himself in a position to be attacked, or, by his own negligence contributed to his injury.[6] Thus,

2. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, note, 23 L. R. A. (N. S.) 1071, 102 Pac. 819.

3. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

4. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

5. Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645.

6. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, 23 L. R. A.

the negligence of a youth in walking under a rope guarding animal-cages at a circus precludes recovery for injuries inflicted by one of the animals, when it is shown that he is bright, and knew that the animals were dangerous, and that the guard-rope was placed there to keep spectators from getting too close to the cages.[7] An owner or keeper of a horse or other animal does not, by representing it to be gentle, thereby become an insurer of the gentleness of the animal toward one who is induced to alter his position with reference to the animal. The owner or keeper is not liable unless, in addition to his representation contrary to the fact, he either knows the representation to be false, or has no reasonable ground for believing it to be true, and unless he makes the representation for the purpose of inducing the injured party to act as he did. The mere fact that the animal became unmanageable does not prove the statement is untrue.[8]

§ 40. **Injuries to Servant.**—The duty of protection against vicious animals, wild or domestic, is not one owing to the public only, but it extends as well to those dealing with or standing in some relation to the owner, those only being excluded from its operation who are themselves in fault. In other words, the duty of protection extends to servants of the owner of an animal as well as to the public in general.[9] The rights and duties of an owner of animals and of a servant employed to attend them are governed by the general rules governing the relation of master and servant, and so it is held to be the duty of a master

(N. S.) 1071, 102 Pac. 819; Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241. See Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123 (where the court says the negligence consists in keeping an animal known to be ferocious); May v. Burdett, 9 Ad. & E. (N. S.) (Q. B.) 101, 58 E. C. L. 101, 115 Eng. Reprint, 1213 (where the court says negligence is presumed from the keeping of an animal known to be mischievous).

7. Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241.

8. Finney v. Curtis, 78 Cal. 498, 21 Pac. 120, Thornton, J., and Beatty, C. J., specially concurring.

9. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, 23 L. R. A. (N. S.) 1071, 102 Pac. 819.

to warn his servants of perils of which he is or ought to be aware, other than such as they should have foreseen as necessarily incident to the business, in the natural and ordinary course of affairs.[10] In accordance with these rules, a person employed to drive horses which are not vicious, is held to assume the risk of being injured by them, when the owner has not failed in some duty to the person injured.[11] When the horses or other domestic animals are vicious, and the owner knows, but the servant is ignorant of this fact, it is the duty of the owner to warn the servant of his danger.[12] If the servant is warned of the vicious character of the animal, and with knowledge of the danger proceeds with his work, he must be presumed to have taken upon himself the risk of the danger which he incurred, and he cannot hold his employer liable for injury received in consequence thereof.[13] But conversely, if the master fails to warn the servant, he is responsible in damages for injuries inflicted by such vicious animals. It, therefore, is of the essence of a servant's case, that he is ignorant of the viciousness of the animal until the injury has occurred.[14]

Under the doctrine of imputed knowledge, if the vicious disposition is known to an employee whose duty it is to attend the animals and take care that no person is injured thereby, the master would be responsible if such employee failed to warn another employee ignorant of his danger, and carelessly suffered him to go near enough to the animal to be injured by it. The fact that the employee who possessed knowledge of the animal's disposition is a

10. Arthur v. Merchants' Ice & C. S. Co., 173 Cal. 646, 161 Pac. 121 (quoting 1 Shearman & Redfield on Negligence, §§ 185, 293). See MASTER AND SERVANT.

11. Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695.

12. Arthur v. Merchants' Ice & C. S. Co., 173 Cal. 646, 161 Pac. 121; Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, note, 23 L. R. A. (N. S.) 1071, 102 Pac. 819.

13. Arthur v. Merchants' Ice & C. S. Co., 173 Cal. 646, 161 Pac. 121.

14. Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645; Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695.

fellow-servant of the person injured is immaterial, since the obligation from them is on behalf of their employer to warn the party of his danger. In discharging this duty, the employee would have represented his principal and would not have been acting as a fellow-servant.[15]

With reference to the extent of the warning it is clear that an employer is not required to give his employee minute directions as to the character of the danger he incurs in driving a vicious animal and as to the means of avoiding them, if any there be, when the employee himself has experience in such matters. An argument that the animal in question is unusually vicious, and that the employee did not appreciate the full extent of his danger, is not sustainable unless it appears that the master had knowledge of this fact, for if the employer was not aware of the danger, he would not be negligent in directing the servant to act in a manner apparently without danger.[16]

§ 41. Negligence as Ground of Liability.—The liability of the owner of an animal for injuries inflicted by it may be predicated upon negligence of himself or his servant in caring for the animal, as well as upon the ground of the keeping of an animal known to be vicious.[17] When the cause of action is founded upon negligence, it is immaterial whether or not the animal inflicting the injury has a vicious disposition,[18] and whether the owner has knowl-

15. Gooding v. Chutes Co., 155 Cal. 620, 18 Ann. Cas. 671, note, 23 L. R. A. (N. S.) 1071, 102 Pac. 819, in which a person employed to attend animals at a zoo was bitten by a camel known to the other employees to be vicious. See supra, § 38, as to imputed knowledge.

16. Arthur v. Merchants' Ice & C. S. Co., 173 Cal. 646, 161 Pac. 121 (where a driver was kicked while in the driver's seat. It was held not to be negligence in an employer to direct the servant to ride in the seat, where he, while knowing the horse to be vicious, did not know he could kick so high).

17. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; Finney v. Curtis, 78 Cal. 498, 21 Pac. 120; Ficken v. Jones, 28 Cal. 618. See Lindley v. Knowlton, 179 Cal. 298, 189 Pac. 798 (damages resulting from negligent keeping of a chimpanzee. See supra, § 37, note 19, for the holding in this case).

18. Ficken v. Jones, 28 Cal. 618.

edge thereof.[19] Inasmuch as the driving of cattle through the streets of a populous town or city, is ordinarily attended with danger to the lives and limbs of persons who have a right to be there, the law requires of the owners and managers of that business the utmost care and diligence. Under the law governing such cases, if a person sustains injury without fault on his part, the negligence is, prima facie, that of the defendant, upon whom the burden is then cast to show that the injury occurred without fault on his part.[20] So, also, if an owner of stock permits his stock to run at large on public streets he is liable for injuries caused thereby, unless the person injured is guilty of contributory negligence. And when the person injured is a child, the mere fact that he was allowed to play in the street at the time does not constitute such negligence as precludes recovery, especially when the street is comparatively unfrequented.[1]

§ 42. **Negligence of Servant.**—The rule that a master is liable for negligence of a servant within the scope of his employment is applicable to cases where an owner of animals intrusts them to a servant.[2] Thus, where it is a part of the task of a servant to drive an animal upon a highway, the master is liable if in the performance of this duty injury results to one without fault by reason of the servant's negligence. If at the commencement of this undertaking the animal unexpectedly attacked and injured some person, it may well be argued that the servant was exercising due care and the master is not liable. But if during employment, he acquires knowledge of the vicious character of the animal, and fails to exercise requisite care thereafter, the master would be liable, though at the time the task was begun, neither knew of the ani-

19. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; Ficken v. Jones, 28 Cal. 618; Mosier v. Beale, 43 Fed. 358.

20. Ficken v. Jones, 28 Cal. 618.

1. Karr v. Parks, 40 Cal. 188.

2. See. generally, 18 Ruling Case Law, 803.

mal's vicious disposition.[3] As tending to show the exercise of due care, it has been held that, when the circumstances are such as to require the exercise of the highest degree of care, the master may show that the servant in charge of animals at the time an injury was done was a person of experience and competent skill, though proof of this fact alone might not be sufficient to exonerate the master of all liability.[4] It is, however, well settled in this state, that evidence of this character is not admissible when the circumstances do not require the defendant to exercise more than ordinary care, as in a case where the servant of the defendant is driving a team on the highway. In such case the issue is whether or not the servant exercised ordinary care at the time of the accident. Evidence of the character of the servant as a careful driver would not tend to show that he was exercising due care at the time, and is therefore inadmissible.[5] In such case the inquiry is as to the quantum of proof required and not as to the materiality or relevancy of the evidence.[6]

§ 43. **Actions—Pleading—Evidence.**—In an action for injuries inflicted by a domestic animal, the gist of which is the keeping of an animal with knowledge of its vicious propensities, the complaint must allege the viciousness of the animal and the defendant's knowledge thereof,[7] the fact of the injury and damage,[8] and if the person injured is a servant employed to attend the animals, his ignorance of the viciousness of the animals until he was injured.[9]

3. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

4. Ficken v. Jones, 28 Cal. 618.

5. Towle v. Pacific Improvement Co., 98 Cal. 342, 33 Pac. 207. See NEGLIGENCE.

6. Spear v. United Railroads of S. F., 16 Cal. App. 637, 117 Pac. 956.

7. Smith v. Royer (Cal.), 183 Pac. 660; Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695. See supra, § 37.

8. Smith v. Royer (Cal.), 183 Pac. 660.

9. Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645 (holding that an allegation that plaintiff had no knowledge of the viciousness of said horse at any time prior to attempting to use the same, is undoubtedly subject to a specific demurrer, because it is

If the animal which inflicted the injury is a wild animal, it is unnecessary to allege the owner's knowledge of its viciousness, as he is presumed to have such knowledge.[10] In neither case is it necessary to allege negligence on the part of the defendant, and if such an averment is made it will be treated as surplusage.[11] The viciousness of the animal which injured the plaintiff may be shown by specific acts of viciousness.[12] The mere fact that the animal became unmanageable, and injured the plaintiff, is not sufficient to prove it vicious or generally unsafe,[13] nor is it sufficient proof of viciousness to detail the behavior of the animal under extraordinary circumstances.[14] While the knowledge of the owner or keeper of an animal may be shown by evidence of prior specific instances of viciousness brought home to him, or a servant in charge of the animal,[15] or by an admission of knowledge of viciousness,[16] admissions by a servant following the injury complained of, are not, it has been held, competent evidence of the owner's knowledge at the time of the injury, especially where the servant was never empowered to speak for the owner.[17]

When the gist of an action for injuries done by an animal is negligence, it is not necessary to allege that the owner had knowledge of the vicious propensity of the animal, as such matters are immaterial when negligence

pregnant with the admission that the plaintiff did learn of the character of the horse after using him and before the injury was done. But when the evidence is clear on this point and cures the defect, the error will be disregarded on appeal); Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695.

10. See Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269.

11. Opelt v. Al. G. Barnes Co. (Cal. App.), 183 Pac. 241.

12. See Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695.

13. Finney v. Curtis, 78 Cal. 498, 21 Pac. 120.

14. Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695.

15. Smith v. Royer (Cal.), 183 Pac. 660. See Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645.

16. See EVIDENCE, as to the competency of admissions as evidence.

17. Arthur v. Merchants Ice & C. S. Co., 173 Cal. 646, 161 Pac. 121.

is alleged.[18] But if both grounds of action are without objection included in the same pleading, the complaint contains two distinct causes of action, and the court in instructing the jury should clearly recognize the distinction between them.[19]

IX. Injuries and Cruelty to Animals.

§ 44. Civil Liability for Injuries to Animals.—If one unlawfully and unjustifiably injures or kills the animals of another, he is of course, liable in damages to the owner,[20] and if he inflicts the injuries willfully or by gross negligence, in disregard of humanity, exemplary damages may be awarded against him.[1] One is liable for injuries to animals not only when such injuries are inflicted by himself, but he is liable also when such injuries are inflicted by vicious animals owned by him and known by him to be vicious.[2] The fact that the animal killed or injured is trespassing on the land of the defendant is no justification for killing or injuring it, whether the act is done in a county in which the common law of trespassing animals governs, or in a county where such law does not prevail. While under the fence laws, as has been seen, the owner or occupant of land may drive cattle off his land,[3] he has no right to kill, maim, or materially hurt or injure any animal upon his grounds, whether or not they are inclosed by a lawful fence, and he is liable in damages if he does so.[4]

18. Mosier v. Beale, 43 Fed. 358. See supra, § 41.

19. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

20. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Roos v. Loeser (Cal. App.), 183 Pac. 204; Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180. See infra, § 50, as to action for injuries to dogs; and infra, §§ 54, 55, as to killing of sheep-killing dogs, etc.

1. Civ. Code, § 3340.

2. Roos v. Loeser (Cal. App.), 183 Pac. 204. See infra, §§ 51, 52, 53.

3. See supra, § 23.

4. Stats. 1855, p. 70, amending act March 30, 1850, Stats. 1850–53, p. 793.

In those counties in which the common-law rule as to trespassing animals is repudiated, and where it is the custom to permit domestic animals to roam at large upon the uninclosed commons, the owner commits no unlawful act in permitting them to run at large, and when they stray upon uninclosed railroad tracks and are injured or killed, he is not deemed to be guilty of such contributory negligence as precludes recovering their value from the railroad company.[5] While formerly it was necessary in the latter case to prove negligence on the part of the railroad company, the present law requires railroad corporations to fence their tracks, and makes them liable irrespective of negligence, if they fail to do so.[6] In an action to recover damages for injury to the plaintiff's cattle, the defendant may file a cross-complaint seeking damages for trespasses of the plaintiff's cattle upon the defendant's land, when the defendant's cause of action relates to or depends upon the transaction upon which the action is brought. To show the relationship of the cross-demand to the plaintiff's demand, it must be alleged that the wrongs alleged in the complaint were done on the defendant's land or that the plaintiff's animals were found damage feasant on his land. If this is not shown, the cross-complaint is demurrable.[7]

§ 45. **Criminal Liability.**—It is a misdemeanor for any person to maliciously kill, maim, or wound an animal, the property of another,[8] and to willfully or negligently, while hunting upon the inclosed lands of another, kill, maim, or wound an animal the property of another.[9] The code also provides that every person who willfully administers any poison to an animal, the property of another, or maliciously exposes any poisonous substance with intent that the same shall be taken or swallowed by any such animal,

5. Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561. And see Logan v. Gedney, 38 Cal. 579, as to the ranging at large of sheep over and upon uninclosed public or private land.

6. See RAILROADS.

7. DeMartin v. Albert, 68 Cal. 277, 9 Pac. 157.

8. Pen. Code, § 597.

9. Pen. Code, § 384c.

is punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding one year, and a fine not exceeding five hundred dollars.[10] These offenses, in accordance with the general rules governing indictments and informations, may be charged in the language of the statute. In charging the latter offense, it is not necessary to state that the act was feloniously done. Nor is it necessary to specifically name the poisonous substance or state that it was a substance that would kill. It is sufficient, for example, to charge that the defendant did willfully, unlawfully, and maliciously expose a poisonous substance in a watering-trough of A B, with intent, then and there, that the same should be taken and swallowed by the horses of said A B, contrary to the form, force and effect of the statute, etc. On conviction of the latter offense, the court may sentence the defendant to imprisonment in the state prison, and it has been held that this may be done notwithstanding the fact that in the information and in the judgment the offense is designated as "malicious mischief in putting a poisonous substance," etc.[11]

§ 46. **Cruelty as an Offense.**—Cruelty to animals was not indictable as an offense at common law, however brutally or cruelly the animals were abused. Within comparatively modern times, man has assumed a more humane attitude toward brute creation, and, as a result, statutes now generally prevail making cruelty to animals a criminal offense.[12] In California, cruelty to animals is made a misdemeanor. Just what acts constitute the offense and are punishable as such, are specifically enumerated in the code. Thus, it is provided in substance, that every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink or shelter, cruelly beats, mutilates, or cruelly

10. Pen. Code, § 596. See, also, Pen. Code, § 216, administering poison to people.

11. People v. Keeley, 81 Cal. 210, 22 Pac. 593.

12. See 1 Ruling Case Law, 1165.

kills any animals or causes these acts to be done; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the same, or in any manner abuses any animal, or fails to provide the same with proper food, drink, shelter or protection from the weather, or who drives, rides or otherwise uses the same when unfit for labor, is for every such offense guilty of a misdemeanor.[13] The code and statutes also forbid numerous other specific acts referred to in the notes below.[14] Unlike the common law, by which the offense was not indictable, unless perhaps the circumstances were such as to constitute the crime of malicious mischief, or in other words, unless malice toward the owner of the animal existed, present statutes have for their purpose the protection of the animals themselves, and therefore malice toward the owner is not an element of the offense.[15] Neither is malice toward the animal, or an intent or purpose to torture or torment it, a necessary ele-

13. Pen. Code, §§ 597, 599b (terms defined); § 599c (certain acts excepted from statute). See State v. Gould, 26 W. Va. 258, holding that an act substantially the same as our statute creates a number of separate and distinct offenses of a similar nature. See supra, § 16, marking and branding animals does not constitute cruelty.

14. Pen. Code, § 597a (added to the code in 1905 forbidding the carrying of domestic animals on a vehicle in a cruel manner and giving a lien to person with whom animal is deposited); Pen. Code, §§ 597a, 599d, (docking tails of horses); Pen. Code, § 597b (registration of docked horses); Pen. Code, § 597c (evidence of docking tails of horses); Pen. Code, § 597d (certain stock excepted from act relating to docking tails of horses); Pen. Code, § 597c (keeping or training fighting animals); Pen. Code, § 597b, added by Stats. 1907, p. 845, § 597d (causing animals to fight is forbidden, and persons present may be arrested without a warrant); Pen. Code, § 597e (impounding animals without food and water); Pen. Code, § 597f (permitting any animal to be in any building, inclosure, lane, street, square or lot without proper care and attention); Stats. 1903, p. 139 (forbidding use of bristle-burr, tack-burr or like devices); Stats. 1901, p. 553 (unlawfully administering drugs to animals on exhibition). See Code Civ. Proc., § 1208, prescribing mode of enforcing lien given by Pen. Code, §§ 597a and 597b.

15. See 1 Ruling Case Law, 1165, § 108. See, also, MALICIOUS MISCHIEF.

ment of the offense of torturing or tormenting; one is guilty who willfully and knowingly does acts which necessarily cause an animal torture, torment, or great pain.[16] Under a prior code provision declaring everyone guilty of a misdemeanor who maliciously and cruelly beats, tortures or injures an animal, malice was an essential ingredient of the offense. But the statute was satisfied where the acts constituting cruelty were willfully and unlawfully done, and therefore, a complaint, under this act, has been held sufficient to charge an offense, which alleged the willful and unlawful beating of an animal, though it omitted the word "malicious."[17]

§ 47. **Societies for the Prevention of Cruelty.**—The code authorizes the formation of societies for the prevention of cruelty to children and animals.[18] Such societies may receive and dispose of property, both real and personal,[19] and may by resolution appoint humane officers.[20] Any such society or any member or officer thereof may prefer complaints against persons for the violation of any law affecting or relating to children or animals and aid in the prosecution of any such offender,[1] and the humane officers after qualifying have power lawfully to interfere to prevent the perpetration of any act of cruelty upon any dumb animal, and to use such force as is necessary. They may make arrests for violations of penal laws relating to dumb animals in the same manner as a constable or other peace officer, and they may carry such weapons as peace officers are authorized to carry, except that in certain cities and cities and counties written permission so to do must be first granted by the board of police commissioners.[2] Whether such permission shall be given is entirely discretionary with the board of peace commissioners, and

16. 1 Ruling Case Law, 1166, § 109.

17. Ex parte Mauch, 134 Cal. 500, 66 Pac. 734.

18. Civ. Code, §§ 607–607g.

19. Civ. Code, §§ 607a.

20. Civ. Code, § 607b.

1. Civ. Code, §§ 607b, 607c (magistrates and peace officers must aid in enforcement of laws).

2. Civ. Code, § 607f.

its discretion in this respect cannot be controlled by mandamus.[3] Humane officers may enter any place where there is an exhibition of fighting birds or animals, and without a warrant arrest all persons present.[4] And it is their duty to take possession of animals abandoned or neglected in cities and townships and to care for them. If such animal is sick, disabled, infirm or crippled, it may be killed if, after due search, no owner can be found. Such officers may also take charge of any animal that by reason of lameness, sickness, feebleness, or neglect, is unfit for the labor it is performing, or that in any other manner is being cruelly treated.[5] And they may notify owners of animals unfit for work to kill them, and on order of a court or magistrate, kill such animal.[6] Compensation of societies for the prevention of cruelty to animals may be paid by the governing body of the city, or city and county or county where such society exists.[7] And in addition thereto, the surplus remaining after the satisfaction of certain liens from acts done to prevent cruelty to animals, must, if the owner of the animal is unknown, be paid into the treasury of the humane society of the county or city and county where the sale takes place.[8]

X. Dogs.

§ 48. Dogs as Property.—The status of dogs before the law is sui generis. In the early common law, property in them was of an imperfect and peculiar character, but they were considered property for many purposes.[9] They had

3. United States Protective Assn. v. Board of Police Commissioners, 14 Cal. App. 249, 111 Pac. 755.

4. Pen. Code, § 597d.

5. Pen. Code, § 597f (providing also for notice to the owner of the animal taken charge of when known, and for a lien on the animal for necessary expenses incurred in caring for and keeping it).

6. Pen. Code, § 599e.

7. Civ. Code, § 607e.

8. Civ. Code, § 1208.

9. Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180. See In re Ackerman, 6 Cal. App. 5, 91 Pac. 429, where the court said: "At the common law, the dog was classified in the category of animals ferae naturae, and many of them should be so classed now."

no intrinsic value, and were regarded as being kept only through the whim or caprice of their owner.[10] They were not the subject of larceny, for the reason that such crime was punishable by death, and it was not considered proper that a man should die for the larceny of a dog.[11] But except in the case of larceny, a dog was property at the common law, and the owner had his remedy by civil action for an injury to or loss or destruction of the same.[12] Our modern law recognizes that dogs have pecuniary value, and constitute property of their owner, as much so as horses and cattle or other domestic animals,[13] and the Penal Code specifically provides that dogs are personal property, and their value is to be ascertained in the same manner as the value of other property.[14] While it has been said that dogs are held in less regard and protection than more harmless and useful domestic animals, and are subject to a more strict control and regulation as to the mode of their keeping and use,[15] it is equally true that aside from their pecuniary value their worth is generally recognized by writers and jurists.[16]

§ 49. **Police Regulation as to Keeping.**—While there is no power in municipal or other authorities to prohibit the ownership of dogs, it cannot be questioned but that property in dogs may be subjected to regulation by the state or municipal authorities in the exercise of its police power.[17] While it has been contended that the right to

10. Roos v. Loeser (Cal. App.), 183 Pac. 204.

11. Sabin v. Sabin, 26 Cal. App. 676, 147 Pac. 1180.

12. See infra, § 50.

13. Roos v. Loeser (Cal. App.), 183 Pac. 204. See Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180; In re Ackerman, 6 Cal. App. 5, 91 Pac. 429; Ten Hopen v. Walker, 96 Mich. 236, 35 Am. St. Rep. 598, 55 N. W. 657.

14. Pen. Code, § 491; Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219.

15. Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180. See infra, § 49.

16. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Roos v. Loeser (Cal. App.), 183 Pac. 204. See infra, § 50, as to action for injuries to dogs.

17. In re Ackerman, 6 Cal. App. 5, 91 Pac. 429; Jenkins v. Ballantyne, 8 Utah, 245, 16 L. R. A. 689,

regulate dogs does not exist in this state because the statute here impresses him with the full status of property, this contention is not maintainable, as it is well settled that domestic animals running in the streets are subject to regulation, notwithstanding ownership of such animals may be absolute. This regulation of property in dogs may take the form of a license.[18] An ordinance providing that the owner of a dog shall on payment of the required tax attach to the collar worn by the dog, a seal or device as evidence of ownership and of such payment, and providing for the enforcement of a penalty for noncompliance, and also for the destruction of dogs not wearing the required collars, is an exercise of the police power, and not of the taxing power, where the fee exacted for such license is not intended for the purpose of revenue, but is designed to cover the expense of supervision and the proper enforcement of the ordinance.[19] An ordinance is not unreasonable which requires the payment of the full license tax for a calendar year, regardless of the time when the dog is acquired, for the new owner would not be liable for the tax if it was paid by the previous owner, and conversely, if the previous owner had not done so, it is not unreasonable to require the subsequent owner to do so. Nor is an ordinance objectionable as taking property without due process of law which provides for the destruction of unlicensed dogs, without notifying their owners, when they are not redeemed after being impounded. But a marshal has, of course, no right to go upon the private premises of a citizen upon an official mission, without being armed with process, except where, upon such premises, he might himself witness the commission of a crime.[20]

30 Pac. 760. See CONSTITUTIONAL LAW as to source and limitations of police power.

18. See cases cited infra, and generally, see LICENSES.

19. In re Ackerman, 6 Cal. App. 5, 91 Pac. 429. See 1 Ruling Case Law, 1127.

20. In re Ackerman, 6 Cal. App. 5, 91 Pac. 429. See Pol. Code, § 4041, subd. 27, authorizing boards of supervisors to tax dogs and direct the application of the tax.

§ 50. Action for Injuries to Dogs.—While dogs were not recognized as property at common law for some purposes, it is well settled both by the early common law and by the modern law, that there is such a property in dogs that an action for damages will lie for their malicious destruction or injury.[1] Indeed, this is an appropriate remedy by which to test the lawfulness of the killing of a dog that was killing, wounding or worrying sheep.[2] The fact that a dog was upon the public streets without being licensed does not preclude a recovery for its value, for it is well settled that the violation of an ordinance wherein a penalty for noncompliance is prescribed cannot in addition thereto deprive a party of his civil rights to recover damage sustained by the negligence or wrong of another, when such violation bears no relation to the injury, and does not contribute in the remotest degree thereto.[3] The pecuniary value of a dog may be the market value, or some special or peculiar value to its owner to be ascertained by reference to its usefulness or other qualities. Value is a question for the jury, after hearing evidence directed to these points.[4]

§ 51. Liability for Injuries Done by Dogs.—The law recognizes the right of a person to keep a ferocious dog, that is, one accustomed to bite mankind.[5] While the gravamen of an action for injuries caused by a dog is knowledge in the owner or keeper of the viciousness of the dog,[6] when the owner or keeper possesses such knowl-

1. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Roos v. Loeser (Cal. App.), 183 Pac. 204; Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180. See discussion as to measure of damages for loss of a dog, Vol. 3, Cal. Law Review, p. 231.

2. See Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180. See infra, §§ 54, 55.

3. Roos v. Loeser (Cal. App.), 183 Pac. 204, quoting Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109.

4. Roos v. Loeser (Cal. App.), 183 Pac. 204.

5. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269. See supra, §§ 37–43, as to liability for injuries by other animals.

6. Smith v. Royer (Cal.), 183 Pac. 660; Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293; Roos v. Loeser (Cal. App.), 183 Pac. 204.

edge, he is an insurer of the acts of the animal to anyone injured without fault.[7] There is an exception to this rule of scienter, in the case of sheep-killing dogs. With reference to them, the law provides that the owner, possessor, or harborer of any dog or other animal that shall kill, worry, or wound any sheep, angora goat, or cashmere goat, or poultry, shall be liable to the owner of the same for the damages and costs of suit to be recovered in any court of competent jurisdiction; and that in such action it shall not be necessary for the plaintiff to show that the owner, possessor, or harborer of such dog or other animal, had knowledge of the fact that such dog or other animal would kill, wound or worry sheep, goats, or poultry.[8]

§ 52. **Persons Liable.**—It is clear that an owner of a vicious dog, who has control of him, is responsible in damages for injuries done by the dog if he knows the dog to be vicious. He is responsible, though the dog may live with other persons and is sometimes seen with them.[9] But liability is not restricted to the true owner. If anyone undertakes to keep a vicious dog or other animal, whether he owns him or not, if he knows him to be vicious, he is bound to keep him in such a manner as not to endanger the lives or persons of others.[10] Therefore, in an action for injuries it is not necessary to prove that the defendant is the owner. It is sufficient to prove that he harbors or keeps the dog which injured the plaintiff.[11] A person is a keeper of a dog within the rule, who is a head of a family, and who, having possession and control of a house or premises, suffers or permits

7. Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293.

8. Civ. Code, § 3341; Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180.

9. O'Rourke v. Finch, 9 Cal. App. 324, 99 Pac. 392. See supra, § 38, as to persons liable for injuries by animals generally.

10. Wilkinson v. Parrott, 32 Cal. 102.

11. Smith v. Royer (Cal.), 183 Pac. 660; Wilkinson v. Parrott, 32 Cal. 102 (an instruction making ownership a test of liability properly refused).

a dog to be kept on the premises. This is true, though the title to the premises and the ownership of the dog may be in another.[12] On the other hand, a master who does not reside on and who has not the possession and control of the premises, and who does not authorize or require his servant to keep a dog is not the keeper of a dog owned by the servant. The master in such case is not liable for injuries done, unless the owner acted as servant in the matter of keeping and harboring the dog, for that relation in the particular act of which complaint is made, is the test in every case, as to whether the principle of respondeat superior applies. Thus, the owner of a bridge is not liable for damages for vicious acts of a dog belonging to the toll-keeper, either upon the ground that he is the keeper of the dog, or upon the further ground that the dog is an obstruction to safe travel for which the owner is responsible.[13]

§ 53. **Pleading and Proof.**—In an action to recover damages resulting from the biting by a dog, it is necessary to prove: (1) that the dog bit the plaintiff; (2) that the dog was vicious and accustomed to bite people; (3) that this fact was known to the defendant, and (4) that the dog was harbored or kept by the defendant.[14] The plaintiff need not, in his complaint, negative contributory negligence, as the doctrine is well established in California that negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff.[15] As showing the vicious character of a dog, it is permissible to prove specific

12. Smith v. Royer (Cal.), 183 Pac. 660, where the dog and the premises belonged to the son, who was away at school, and the father had possession and control of the premises.

13. Baker v. Kinsey, 38 Cal. 631, 99 Am. Dec. 438.

14. Smith v. Royer (Cal.), 183 Pac. 660. Ownership need not be proved, see supra, § 52.

15. Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569. See NEGLIGENCE.

instances of the animal's viciousness,[16] for, as it has been said, "every dog is entitled to his first bite before he becomes a biting dog."[17] In proof of this character, it must appear that the animals figuring in the previous attacks and those which injured the plaintiff were the same.[18] With reference to scienter, it is permissible to prove such previous instances of viciousness brought home to the owner or keeper of the dog,[19] or it may be shown that he was personally notified that his dogs were accustomed to run out and bark at and attack people, or that such knowledge or notice was brought home to the defendant's wife or servant, who with his knowledge had custody or control of the dog.[20] In proving ownership of a dog, it may be proved that the defendant bought and paid for the dog, paid license taxes for keeping it, and procured a collar for the dog with his initials engraved thereon. But evidence tending to show that the dog which injured the plaintiff is a trick dog is inadmissible for any purpose, as such evidence does not tend to justify an attack by the dog.[1]

§ 54. **Killing Dogs in Defense of Sheep or Goats.**—The statute provides that any person on finding any dog or other animal, not on the premises of its owner or possessor, worrying, wounding, or killing any sheep, angora or cashmere goats, may, at the time of finding such dog or dogs or other animals, kill the same, and the owner or owners thereof shall sustain no action for damages against any person so killing them.[2] The right to kill dogs under this pro-

16. See Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293.

17. Haneman v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695 (where the action was for damages caused by being kicked by a horse).

18. Smith v. Royer (Cal.), 183 Pac. 660, holding evidence as to identity sufficient.

19. See Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293 (holding evidence sufficient); O'Rourke v. Finch, 9 Cal. App. 324, 99 Pac. 392.

20. Smith v. Royer (Cal.), 183 Pac. 660.

1. O'Rourke v. Finch, 9 Cal. App. 324, 99 Pac. 392.

2. Civ. Code, § 3341. See Pol. Code, § 4041, subd. 27, authorizing

vision is not limited to the owner of the sheep or goats, but extends to "any person" finding the dogs worrying, wounding, or killing the sheep or goats.[3] It is not sufficient, however, that such person believes that the dog is doing the acts prohibited. It is necessary that the dog be actually doing the wrongful act of worrying, wounding, or killing the sheep or goats.[4] The word "worrying" in the statute means running after, chasing, or barking at.[5] The code provides that the dog must be doing the prohibited acts "at the time." This does not mean that to justify the killing, it is necessary to show that the dogs were killed in the very act of worrying the sheep. It would be sufficient if the dogs were found by the party worrying the sheep, and if he had immediately followed them up and killed them without allowing them to escape or get out of his sight. On the other hand, it is not sufficient justification that the killing was done to prevent the dogs from returning and injuring the sheep. The dogs must be caught in the act and then and there killed.[6]

§ 55. Killing Dogs in Defense of Other Animals or Property.—While the code provision excusing proof of scienter in actions for damages caused by the killing, worrying or wounding of sheep, goats, or poultry, specifically mentions poultry,[7] the provision authorizing the killing of the dog by any person catching him in the act, does not mention poultry or any animals other than sheep and goats.[8] It has been argued from this that the right to kill dogs in defense of other animals does not exist, but this contention is not maintainable. While the mere

boards of supervisors to provide for the prevention of injuries to sheep by dogs.

3. Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180.

4. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219.

5. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219, per McFarland, J., dissenting; Marshall v. Blackshire, 44 Iowa, 475.

6. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219.

7. Civ. Code, § 3341, subd. 1.

8. Civ. Code, § 3341, subd. 2.

fact that a dog is trespassing does not of itself justify one in killing it,[9] the natural right has always existed in one to defend his animals or property upon his own premises from the attack of trespassing dogs. And at the common law the justification for the killing was complete when it appeared that the dog was engaged in worrying and terrifying domestic animals in their own lawful inclosure, and where the necessity of the killing in order to protect the property was apparent. The right to destroy dogs, however, was limited at common law to the owner of the animals wounded or worried. Therefore, the code provision in question, in extending the remedy to any person who catches a dog in the act of worrying sheep or goats, whether he is the owner or not, provides an additional and cumulative remedy, and does not abridge the common-law right of an owner of poultry or other animals to kill trespassing dogs, engaged in worrying and killing them while in their own lawful inclosure where the necessity for the killing is apparent.[10] The right to kill a dog is not affected by the relative value of the dog and the property being injured, especially where it is not shown that the party killing it knew of any especial value of the dog, for as said by the court, it can hardly be expected that the owner of poultry is bound to stand by and mentally calculate the value of the chickens destroyed, and postpone action until such value approximately equaled that of the dog.[11]

9. Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219.

10. Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180 (citing 2 Cooley on Torts, 3d ed., 702).

11. Sabin v. Smith, 26 Cal. App. 676, 147 Pac. 1180. See discussion doubting reasonableness of rule giving an unlimited right to kill dogs in defense of one's animals, Vol. 3, Cal. Law Review, p. 316.

(J. O. T.)

ANNUITIES.

1. Definition and Creation.
2. Payment.
3. Principal Fund.

§ 1. Definition and Creation.—The Civil Code, in the chapter containing "general provisions relating to wills," defines an annuity as "a bequest of certain specified sums periodically."[1] Etymologically, annuity implies a yearly payment, yet grants providing for monthly or quarterly payments are none the less within the principles and rules pertaining to the subject, and, if made by will, are within this code definition.[2] Of course, the code, in defining an annuity as a bequest, has not intended to declare that annuities cannot be granted otherwise than by will. The general rule is that an annuity may be granted by deed as well as by will, may be given by way of marriage settlement or gift, or like any other chose in action may be the subject of a contract.[3] A gift of an income from a certain fund is not an annuity if the amount to be paid is not certain.[4] Any natural person may grant an annuity

1. Civ. Code, § 1357, subd. 3. In re MacKay's Estate, 107 Cal. 303, 40 Pac. 558, citing this provision of the code, and holding that a mere bequest of a specified sum in gross, the income of which (an uncertain quantity) is to be paid to another person, is not an annuity.

2. In Cohen v. Cohen, 141 Cal. 534, 75 Pac. 100, the contract was for a monthly payment. In England it has been held that where the annuity is directed to be paid monthly the first payment should be made at the expiration of a month after the testator's death. Houghton v. Franklin, 1 Sim. & St. 390, 57 Eng. Reprint, 156, 3 Eng. Rul. Cas. 151.

3. 2 Ruling Case Law, 2.

4. In re MacKay's Estate, 107 Cal. 303, 40 Pac. 558. In re Estate

and life insurance companies often provide for payments of this kind either to the insured or to a beneficiary.[5] By statute any charitable, religious, benevolent or educational society, corporation, institution or association which shall have been in operation for at least ten years, and which has obtained from the insurance commissioner a permit or certificate of authority to do so, may receive grants of property conditional upon its agreement to pay an annuity. Provision is made for a reserve fund to safeguard such annuities.[6]

§ 2. Payment.—Where annuities are given by will, according to express provision of the Civil Code, they "commence at the testator's decease."[7] This, of course, applies where no express intention on the part of the testator to fix another time can be found, and a clause in a will providing for payment of annuities as soon as the trustees should have sufficient funds available for that purpose is to be construed as relating only to the time of payment, and not to the date when the annuities begin to run.[8] On the other hand, where the will provides for an uncertain payment out of income from a trust fund, the payment does not commence until after final distribution of the fund to the trustees and the receipt by them of income from the fund.[9] If the fund or property out of which annuities are payable fails, it is provided by the Civil Code that "resort may be had to the general assets,

of Brown, 143 Cal. 450, 77 Pac. 160, where a will bequeathed a fund to be invested and out of the income to pay monthly twenty dollars during the beneficiary's life, the court holding that this was but an uncertain payment out of income which might be more or less than twenty dollars a month, and was not an annuity, distinguishing In re MacKay, supra. As to legacies for maintenance generally, see WILLS.

5. See Civ. Code, §§ 453d–453p, codifying the act of 1905, p. 418, relating to life, health, accident and annuity or endowment insurance on the assessment plan. See INSURANCE.

6. Pol. Code, § 594½; Stats. 1919, p. 823.

7. Civ. Code, § 1368.

8. Crew v. Pratt, 119 Cal. 131, 51 Pac. 44.

9. In re Estate of Brown, 143 Cal. 450, 77 Pac. 160.

as in case of a general legacy."[10] This provision, it has been observed, was doubtless adopted to cut off what had previously been a fruitful source of litigation in other states.[11] Under this section, and under a will providing that the first installment of an annuity should be paid by the trustees "as soon after my decease as sufficient funds for the purpose shall come into their possession," and that the annuity should be a first charge upon and should be "made out of any money to come into the hands of said trustees on account of my estate," such installment is payable out of the first moneys sufficient for the purpose to come into the hands of the trustees from any source.[12] Where periodical payments are required for the maintenance of a person, as in all other cases of annuities, the problem before the court is to gauge correctly the real intent of the donor.[13] Where an annuity is made a lien upon land and the payments are not met as due, the usual remedy by foreclosure is available.[14]

10. Civ. Code, § 1357, subd. 3.

11. Crew v. Pratt, 119 Cal. 131, 51 Pac. 44. In other states the general trend of judicial opinion seems to be that the corpus of the estate will not be charged with an annuity unless the intention of the testator so to charge clearly appears. In England, on the other hand, the general rule appears to be that where an annuity is chargeable indefinitely on the income of a fund, and the income is insufficient to meet the annuity as it becomes due, the deficiency, as in California, is chargeable upon the corpus. 2 Ruling Case Law, 8.

12. Crew v. Pratt, 119 Cal. 131, 51 Pac. 44.

13. Cohen v. Cohen, 141 Cal. 534, 75 Pac. 100, construing a contract whereby a son agreed to pay a sum monthly to his father, and further to pay said sum to his sisters "during the period they remain single or unmarried, but the payment as aforesaid is only to be made to said Rose and Esther in case the said Rose and Esther are unmarried after the death" of the father. It was held that the parties did not intend that the marriage of one sister should cut off the other, and that payment should be made to a sister who was unmarried at the father's death, so long as she continued unmarried, although the other sister, prior to the death of the father, became and ever since has been a married woman.

14. A wife who has foreclosed a lien for installments due upon a life annuity charged upon her husband's land by an agreement of separation, and has purchased part of the land in satisfaction thereof, under a decree which allowed a subsequent mortgagee to sell the land

§ 3. **Principal Fund.**—According to the common law where an annuity is absolute and unqualified, the beneficiary, under a will giving property to trustees to pay out a certain sum in the purchase of an annuity, is entitled to receive the principal in lieu thereof. The reasoning on which this rule is established is that the legatee can sell the annuity as soon as it is bought, and the law will not require the performance of a nugatory act.[15] But by the Civil Code

"A beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust."[16]

The investment of a fund, the interest on which is to pay an annuity, the overplus interest to be paid to residuary legatees when the annuity ceases, should be made with due regard to the interests of such legatees. Therefore the court, in order to provide for the required annuity, may direct executors to retain real property belonging to the estate and yielding an income slightly in excess of the annuity, rather than the purchase of United States bonds as suggested by the executors.[17]

subject to the wife's lien, but which did not provide for future installments, or for sales upon motion, may maintain a second action against such mortgagee, who purchases the land subject to her lien, to sell other portions thereof for further installments which have become due upon the annuity. Higgins v. San Diego Sav. Bank, 129 Cal. 184, 61 Pac. 943.

15. 2 Ruling Case Law, 14.

16. Civ. Code, § 868.

17. Estate of Zeile, 6 Cof. Prob. Dec. 363.

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A. INTRODUCTORY.

§ 1. **Scope of Article.**—This article aims to cover the statutory and case law of California relating to the review by appeal and writ of error of judgments and orders rendered or made by superior courts in civil actions generally. It does not treat of appeals in criminal cases,[1] nor of appeals to superior courts, from judgments and orders of justices of the peace,[2] nor does it treat of other methods of reviewing proceedings such as certiorari[3] and motions for new trial.[4] Being a general article, it does not treat of the rules specially applicable to particular actions and proceedings. For the rules relating thereto, reference must be made to the title in which the particular action is considered.[5] Costs on appeal are considered in a separate article,[6] as is also the effect of the death of a party or transfer of interest pending an appeal and the method of substituting parties following such death or transfer,[7] and the effect of an appearance upon appeal as a submission to jurisdiction.[8]

References to other articles in this work will disclose many illustrative applications of the principles here stated generally. It is suggested, therefore, that the practitioner consult, in connection with this treatment of the subject of Appeals, the particular article that is related to his case,

1. See CRIMINAL LAW.
2. See JUSTICES OF THE PEACE.
3. See CERTIORARI.
4. See NEW TRIAL.
5. For example, see the titles, ATTACHMENT; CONTEMPT; DIVORCE AND SEPARATION; EMINENT DOMAIN; INSOLVENCY.
6. See COSTS.
7. See ABATEMENT AND REVIVAL, vol. 1, p. 17.
8. See APPEARANCE.

for by doing so he will in many instances find much that will serve not only to illustrate, but possibly, to amplify, the present text.

§ 2. **Survey of Law.**—The law of appeals in California is declared in title XIII, of part II of the Code of Civil Procedure, embracing sections 936 to 980, and in the rules of the supreme court.[9] These provisions are applicable not only to appeals in civil actions generally, but to appeals in probate proceedings as well, except in so far as they are inconsistent with the provisions of title XI, part III of the code relating to probate proceedings.[10] Appellate procedure has undergone many changes, and even now it is far from perfect. It is constantly subject to legislative changes, and it is therefore essential that the practitioner always consult the latest statutes. Because of these many changes cases decided under earlier statutes are often either valueless or valuable only as an aid in interpreting later statutes. These cases have been noted in this article so that a practitioner may see what relation they bear to the present law, and will not be misled by them; but because of their obsolete character, they have not been considered as fully as cases under the statutes in force.

Of course, it rarely happens that the constitutions and statutes relating to appeals are precisely alike in any two states. On the contrary, the procedure relating to the taking of appeals and the preparation of the record thereon as declared in the statutes of the different states is oftentimes widely divergent. For this reason cases from other states are oftentimes of no value as indicating the proper interpretation of California statutes, though, of course, such cases are persuasive as to certain general

9. See infra, §§ 104–175, as to proceedings to perfect appeal.

10. Code Civ. Proc., § 1714; Estate of Wiard, 83 Cal. 619, 24 Pac. 45.

propositions of universal application, and occasionally the reasons given by courts of other states for particular holdings are worthy of consideration as indicating a proper interpretation.[11]

§ 3. Nature and Form of Remedy Generally—*Writ of error.*—The method at common law by which a judgment in an action at law could be reviewed for error appearing in the record was by writ of error sued out of the court above to bring up the record for examination.[12] This was considered a new action to annul and set aside the judgment of the court below.[13] It was a new and original suit, in which original process was issued and served to bring the adverse party into court. The relative character of the parties was changed, new pleadings were made up, and a final judgment upon it, though it might operate upon the original cause, was nevertheless a termination of the new suit.[14] If the writ was seasonably sued out and bail put into the action, it was a supersedeas, so far as to prevent an execution from issuing on the judgment, pending the writ of error, but left it otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel.[15]

Appeal.—The remedy by appeal was unknown to the common law. It was borrowed from the civil law and was adapted as a method of obtaining a review of the decisions of equity and admiralty courts. The appeal in these courts removed the whole case into the court above for trial de novo. Pending the hearing on appeal, there

11. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

12. Sharon v. Hill, 26 Fed. 337, 11 Sawy. 290. See Widber v. Superior Court, 94 Cal. 430, 29 Pac. 870, holding a writ of error is not in the nature of a writ of review.

13. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178; Widber v. Superior Court, 94 Cal. 430, 29 Pac. 870; Sharon v. Hill, 26 Fed. 337, 11 Sawy. 290.

14. Widber v. Superior Court, 94 Cal. 430, 29 Pac. 870.

15. Sharon v. Hill, 26 Fed. 337, 11 Sawy. 294. See infra, §§ 185–228, as to supersedeas generally.

was no decree in the case, and there could be no estoppel by reason thereof. The tendency during the past century has been to assimilate proceedings in equity and law cases, and under the code practice the proceeding by which a judgment is reviewed in the appellate court is generally known as an appeal, although in effect it is more like a writ of error than an appeal.[16] An appeal under the law of California is of the character last described. It is a direct attack upon the judgment or proceeding,[17] but it has been held to be a continuation of the action merely and not a new suit.[18]

§ 4. Right of Appeal in General.—Since appeals had no existence at common law, it follows that any right to take an appeal must be found either in the constitution or statute.[19] And as the constitution has not undertaken to define or secure the right of appeal to any person as against legislative control, the legislature has com-

16. Sharon v. Hill, 26 Fed. 337, 11 Sawy. 290.

17. Patterson v. Keeney, 165 Cal. 465, Ann. Cas. 1914D, 232, 132 Pac. 1043.

18. Meredith v. Santa Clara Mining Assn., 60 Cal. 617. Compare Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178, where the court speaking of motions for a new trial says: "Under our practice, proceedings by an unsuccessful party to obtain a new trial are analogous to proceedings on writ of error, or an appeal in the nature of a writ of error, and are, in effect, a new action brought to reverse a judgment in the lower court, and if for any reason they abate, the judgment sought to be reversed remains in force as if no such proceedings had ever been brought." McDonald v. McConkey, 54 Cal. 143 (an appeal like a writ of error is a new proceeding, and a party has full power to constitute an attorney to take an appeal other than the attorney of record in the court below). See, also, Davidson v. Dallas, 15 Cal. 75, where it is said that an appeal may be regarded as a new and distinct action, in which in theory issue is joined upon the assignment of errors made upon the record. See 2 Ruling Case Law, 28.

19. Gale v. Tuolumne County Water Co., 169 Cal. 46, 145 Pac. 532 (contempt proceeding); Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per McKee, J., dissenting); Appeal of Houghton, 42 Cal. 35, per Wallace, J.; Webb v. Hanson, 2 Cal. 133, 3 Cal. 65; Estate of Overton, 13 Cal. App. 117, 108 Pac. 1021; Hackley v. Craig, 2 Cal. Unrep. 289, 3 Pac. 494.

plete control over the right of appeal, and authority to take away the right from an order at any time before the order itself is made.[20]

Appeal where legislature provides no procedure. The statement just made is subject to a limitation. Where the constitution has conferred upon the supreme court or district court of appeal appellate jurisdiction over particular actions, the legislature is without authority to deprive such courts of the jurisdiction conferred. It is the duty of the court to exercise the jurisdiction conferred upon it, and it has been held that this duty is not relieved by the failure of the legislature to provide a means for its exercise. In the absence of any rules of practice enacted by the legislature, the court can establish an entire system of procedure.[1] As was well said in an early case:

"Independently of rules adopted by this [the supreme] court on the subject, an appeal, as a mere procedure, is defined by statute; it is essentially the creature of statute, and may be accorded or withheld, restrained or enlarged

20. Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39; Watt v. Bekins Van & Storage Co., 35 Cal. App. 776, 171 Pac. 832. Compare Estate of Nelson, 128 Cal. 242, 60 Pac. 772, where the court says the right of appeal is conferred by the constitution; Continental Bldg. & Loan Assn. v. Woolff, 11 Cal. App. 677, 106 Pac. 107, following Estate of Nelson, 128 Cal. 242, 60 Pac. 772. See Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 555, 147 Pac. 238 (doubtless, the people can, by constitutional amendment, abolish the right of appeal and require the dismissal of appeals remaining undetermined).

1. People v. Jordan, 65 Cal. 644, 4 Pac. 683; Appeal of Houghton, 42 Cal. 35, per Wallace, J. (vide Rules of Supreme Court, adopted October Term, 1854, 4 Cal. xv–xxv). See Ex parte Thistleton, 52 Cal. 220, quaere, whether the power to make rules of this character exists; Middleton v. Gould, 5 Cal. 190, which contains a dictum to the contrary. Compare White v. Lighthall, 1 Cal. 347; Warner v. Hall, 1 Cal. 90, concerning which Mr. Hayne, New Trial and Appeal, § 181, says that "at that time the power of the court to frame process proper for the exercise of its jurisdiction in cases where no process had been provided by the legislature does not seem to have been understood"; quoted in People v. Jordan, 65 Cal. 644, 4 Pac. 683.

or wholly abrogated by legislative enactment. It cannot be affirmed to have any existence, except as found in the expression of the legislative will. The constitution has not undertaken to define it, or to secure its benefits, to any person, as against the legislative control. While that instrument has defined the cases to which the appellate jurisdiction of this court extends, it has not attempted to provide, in any wise, for the mere instrumentalities through which that jurisdiction is to be exercised. It has left that subject wholly at large, and to be provided by the legislature through statutes enacted, or, in default of them, by this court, through rules adopted for that purpose. The jurisdiction of this court, as defined by the constitution, is in no sense dependent upon legislative provisions for its appropriate exercise. It exists, and is capable of effective assertion, independently of legislative aid as to the procedure through which it is to be exerted."[2]

But it does not follow that the supreme court would refuse to exercise a jurisdiction imposed upon it by the constitution, in default of a statute or of a rule formally adopted or promulgated. The power to establish rules providing an appropriate practice, where the legislature has not provided such, is not derived from the statute but exists inherently as an incident to the jurisdiction conferred, and in the absence of statute, rules of practice with respect to matters as to which the codes are silent may be adopted to go into force after such publication as the supreme court may deem proper, or without any publication. Therefore, a court having appellate jurisdiction may, in the absence of a statute or rule of court providing the machinery of an appeal, ratify the procedure by which a case is brought up.[3]

§ 5. **When Writ of Error Lies.**—While writ of error, as a remedy to review errors in proceedings at law, ex-

2. Appeal of Houghton, 42 Cal. 35, per Wallace, J.

3. People v. Jordan, 65 Cal. 644, 4 Pac. 683 (disapproving the conclusion of Wallace, C. J., in Houghton's Appeal, 42 Cal. 35, that no appeal could be taken in the absence of statute or a rule of court formally adopted and promulgated).

As to rules generally, see COURTS.

isted at common law, it is well settled that if an appeal be given by the code in a particular case, that remedy is exclusive and must be followed.[4] Not only is the remedy by writ of error taken away by reasonable implication where an appeal is given,[5] but the Code of Civil Procedure expressly provides that a judgment or order in a civil action, except when expressly made final by the code, may be reviewed as prescribed in that title, "and not otherwise."[6] Again, the constitution empowers the appellate courts to issue such writs or process as may be necessary to the exercise of its appellate jurisdiction only. If this appellate jurisdiction can be exercised without a writ of error, then it cannot be necessary, and should not be issued.[7] In reference to the cases where no appeal is given, the negative provision, "not otherwise," does not apply.[8] And a court having appellate jurisdiction and power to issue all writs necessary to the exercise of its powers, as California appellate courts have, will furnish machinery to the end that the right of review be not lost.[9] Such a court may issue a writ of error and thus bring a case up for review.[10] A writ of error is a writ ex debito justitiae, wherever, by reason of error, a judg-

4. Widber v. Superior Court, 94 Cal. 430, 29 Pac. 870; Sacramento, P. & N. R. R. Co. v. Harlan, 24 Cal. 334; Nowland v. Vaughn, 9 Cal. 51; Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

5. Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323, quoting Savage v. Gulliver, 4 Mass. 171, where it was said that "the statute, in giving an appeal, has, in our opinion, taken away by reasonable implication the remedy by error, unless in cases where the aggrieved party, without laches on his part, could not avail himself of an appeal."

6. Code Civ. Proc., § 936.

7. Sacramento, P. & N. R. R. Co. v. Harlan, 24 Cal. 334; Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

8. Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

9. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per Myrick, J., concurring).

10. Ex parte Thistleton, 52 Cal. 220; Sacramento, P. & N. R. R. Co. v. Harlan, 24 Cal. 334; Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323; Middleton v. Gould, 5 Cal. 190; Adams v. Town, 3 Cal. 247, granting a writ of error to the county court to bring up a case within the jurisdiction of the supreme court, where the legislature had omitted to provide for an appeal.

ment of a court of record ought not to stand, and an appeal is not provided by statute.[11]

§ 6. Effect of Other Remedy.—An appeal may be taken from any final decree, regardless of the power of the trial court to modify its judgment, as the defeated party is entitled to have an appellate court say whether a judgment is correct, and is not bound to wait for the court below to change its judgment.[12] Thus, a defendant may appeal from a default judgment immediately, notwithstanding he may have a limited period in which to seek relief from the judgment in the court below. He has an election which remedy to pursue,[13] and he may probably avail himself of both.[14]

When a trial court declines to hear or in any way to act upon a proceeding pending before it, mandamus is the proper remedy by which to determine the duty of the court and compel it to act. This nonaction of the court cannot be reviewed on a general appeal of a case.[15] On the other hand, when a court entertains a proceeding, and decides it according to the best of its ability, errors in the decision are reviewable on appeal, rather than by mandamus, as it is not the office of a writ of mandamus to review errors.[16] While the mere fact that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction will not warrant the issuance of

11. Ex parte Thistleton, 52 Cal. 220.

12. Luck v. Luck, 83 Cal. 574, 23 Pac. 1035.

13. Jameson v. Simonds Saw Co., 144 Cal. 3, 77 Pac. 662; Howard v. Galloway, 60 Cal. 10; Hallock v. Jaudin, 34 Cal. 167 (overruling Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490); Lemon v. Hubbard, 10 Cal. App. 471, 102 Pac. 554.

14. Howard v. Galloway, 60 Cal. 10.

15. Estudillo v. Security Loan & Trust Co., 158 Cal. 66, 109 Pac. 884 (where the court refused to settle a proposed statement); In re Herteman, 73 Cal. 545, 15 Pac. 121. See MANDAMUS.

See infra, § 35, as to right to appeal from order refusing to settle a bill of exceptions, and see § 15 as to necessity of judgment or order.

16. People v. Pratt, 28 Cal. 166. See MANDAMUS.

a writ of prohibition,[17] a party has a remedy by prohibition as well as by appeal, where there is an excess of jurisdiction; though if the remedy by appeal is adequate, a writ of prohibition will not be issued.[18]

§ 7. Successive Appeals.—Since a valid appeal from a judgment or order vests the appellate jurisdiction and leaves nothing pending in the trial court from which an appeal can be taken, it follows that a party against whom a judgment is rendered who has taken and perfected a valid appeal therefrom has no right thereafter to take a second appeal from that judgment.[19] So, also, inasmuch as the failure of the sureties on the undertaking on appeal to justify does not render the appeal ineffectual, a second appeal cannot be taken from a judgment or order merely because of such failure.[20]

Right to take appeal after dismissal of prior appeal.—The right to take an appeal from a judgment or order after a dismissal of a prior appeal therefrom, depends upon whether the dismissal operates as a bar to a further appeal. The Code of Civil Procedure provides that the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.[1] The bar of this section applies where the dismissal is for want of prosecution, unless it be expressly made "without

17. Wreden v. Superior Court, 55 Cal. 504.

18. Dungan v. Superior Court, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See PROHIBITION.

19. People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; Hill v. Finnigan, 54 Cal. 311; Swortfiguer v. White, 6 Cal. Unrep. 778, 66 Pac. 80; Nathan v. Porter, 36 Cal. App. 356, 172 Pac. 170. See infra, §§ 176–184, as to effect of an appeal.

20. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006. See infra, § 160, as to effect of failure of sureties to justify.

1. Code Civ. Proc., § 955.

prejudice,"[2] or where it is upon the merits,[3] or when the dismissal is had by consent.[4] But this code section does not apply so as to preclude another appeal in the same case where the dismissal was made on the ground that the appeal was prematurely taken, because in such case there was at the time nothing from which to take an appeal.[5]

It is not clear whether this section would operate as a bar where the dismissal is because of some defect in the proceedings to take an appeal, such as a failure to file the required undertaking and the like. The dismissal in such case should be "without prejudice."[6] But it has not been decided what would be the effect if the order did not so specify, though it is probable that the dismissal would operate as a bar.[7] Where an appeal is dismissed without prejudice for want of prosecution, the right to take another appeal is not barred by a subsequent inadvertent order dismissing the appeal absolutely, as such order is without effect, there being in such case no appeal pending upon which it can operate.[8]

2. Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537 (dismissal for failure to file transcript); Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170; Estate of Rose, 80 Cal. 166, 22 Pac. 86; Spinetti v. Brignardello, 54 Cal. 521 (dismissal for failure to file requisite papers); Chamberlain v. Reed, 16 Cal. 207 (the only mode of avoiding the consequences of such dismissal is to move during the term or before the remittitur has gone down to vacate the order and reinstate the cause); Karth v. Light, 15 Cal. 324.

3. Estate of Rose, 80 Cal. 166, 22 Pac. 86; Karth v. Light, 15 Cal. 324.

4. Spaeth v. Ocean Park R. M. & Inv. Co., 16 Cal. App. 329, 116 Pac. 980.

5. Estate of Rose, 80 Cal. 166, 22 Pac. 86.

6. Biagi v. Hawes, 63 Cal. 384.

7. See Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379, where it was held that the dismissal of an appeal from an erroneous judgment of a justice of the peace for a technical defect had the effect of putting the judgment beyond attack for any error which could have been availed of by the appellant upon the appeal taken. But under the Practice Act, which contained no provision corresponding to Code Civ. Proc., § 955, it was held that a dismissal on this ground did not bar a subsequent appeal; Karth v. Light, 15 Cal. 324; Martinez v. Gallardo, 5 Cal. 155.

8. Anthony v. Grand, 99 Cal. 602, 34 Pac. 325.

§ 8. Double Appeals.—A party cannot be permitted to prosecute two separate and distinct remedies in the appellate court for the review of the same question at the same time. Where an appeal from a judgment is pending, the appellate court will not entertain an appeal from a decree in a proceeding in the nature of a bill of review which presents the same questions as are presented on the former appeal.[9] But neither this rule nor the rule against successive appeals forbids the taking of several appeals from separate orders or judgments in an action.[10] Accordingly, under the former practice, when orders denying new trials were directly appealable, it was common to appeal at the same time both from the final judgment and an order denying a new trial. The right to appeal from a judgment and from an order denying a new trial were distinct and separate rights. The party might waive either and rely on the other. He might take an appeal from the judgment without waiting the determination of the motion for new trial, or he might prosecute both appeals together.[11] As both proceedings were recognized as being "entirely independent of each other, it followed that a disposition of one appeal did not affect the rights of the parties under the other.[12] An affirmance of the judgment upon an appeal therefrom did not oust the court of authority in effect to reverse it on appeal from an order denying a new trial.[13] The dis-

9. Kirk v. Reynolds, 12 Cal. 99.

10. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187, explaining People v. Center, 61 Cal. 191. See infra, § 123, as to right to include several appeals in same notice of appeal.

11. Vinson v. Los Angeles Pacific R. R. Co., 141 Cal. 151, 74 Pac. 757; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Carpentier v. Williamson, 25 Cal. 154; Marziou v. Pioche, 8 Cal. 522 (the party may take distinct and independent appeals, provided he bring them up for determination at the same time, but the taking of distinct appeals may affect the question of costs); Blackburn v. Abila, 4 Cal. Unrep. 982, 39 Pac. 797; Nathan v. Porter, 36 Cal. App. 356, 172 Pac. 170.

12. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

13. Donner v. Palmer, 45 Cal. 180.

missal of an appeal from a judgment was not a bar to an appeal from a subsequent order denying a new trial.[14] And conversely, the appeal from the judgment might go on after the appeal from the order had been dismissed.[15] As to those errors which may be reviewed on either appeal, the remedy was deemed concurrent, and the party was allowed to pursue either appeal and abandon the other.[16]

§ 9. **Law Governing Appeals.**—It is a general rule that the right of appeal is governed by the law in force at the time of the rendition of the judgment or order complained of.[17] The inconvenience and confusion of holding otherwise is a good illustration of the wisdom of the rules of construction which require statutes to be so construed as not to give them a retroactive operation, unless such an intention is clearly apparent.[18] If no right of appeal exists at the time of the rendition of a judgment or order, a subsequent enabling act does not authorize an appeal therefrom, or have the effect of saving a prior appeal taken without authority.[19] And even where a statute authorizing an appeal goes into effect intermediate the rendition and entry of an order or judgment, it has been held that there is no right to appeal from such judgment or order. The time in which to appeal begins to run from the entry of judgment, but the statutes fixing the

14. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Fulton v. Hanna, 40 Cal. 278; Fulton v. Cox, 40 Cal. 101.

15. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468.

16. Carpentier v. Williamson, 25 Cal. 154.

17. Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712; San Francisco-Oakland Terminal Rys. v. Superior Court, 172 Cal. 541, 157 Pac. 604; Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039; Gates v. Salmon, 28 Cal. 320; Adams v. Town, 3 Cal. 247; Gonzales v. Huntley, 1 Cal. 32; Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46.

18. Gates v. Salmon, 28 Cal. 320. See STATUTES.

19. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48; Peck v. Courtis, 31 Cal. 207; Gates v. Salmon, 28 Cal. 320; Middleton v. Gould, 5 Cal. 190.

time in which to appeal do not confer the right to appeal. The judgment or order is complete and perfect and has full force and effect before it is entered. The right of appeal is given from the judgment and may be exercised when the judgment or order is entered.[20] On the other hand, if a statute depriving a particular judgment or order of its appealable character goes into effect pending an action or proceeding which culminates in such judgment or order, no right to appeal from such judgment subsequently rendered and entered exists.[1] But the courts have declined to dismiss appeals taken when the law authorized such appeal, where to do so would be to give the change in the statute a retroactive effect not intended by the legislature.[2] In short, it is the condition of the law at the time of the making the order or rendering the judgment that controls.[3]

Time to appeal.—Statutes shortening the time for appeal will not be given a retrospective effect, but will be applied to judgments and orders thereafter entered, unless a contrary intention is clearly apparent, for it is presumed that no statute is intended to have such effect unless the contrary clearly appears.[4] In other words, the time within which to take an appeal depends upon the statute in force at the time of the entry of the judgment or order.[5] Upon the entry of judgment, the right of

20. Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039, distinguishing Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, Beatty, C. J., dissenting.

1. Watterson v. Cruse, 179 Cal. 379, 176 Pac. 870; Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475; Nathan v. Porter, 36 Cal. App. 356, 172 Pac. 170; Watt v. Bekins Van & Storage Co., 35 Cal. App. 776, 171 Pac. 832; Hester v. McMullan, 29 Cal. App. 664, 157 Pac. 521; Slye v. Hunt, 29 Cal. App. 117.

2. San Francisco-Oakland Terminal Rys. v. Superior Court, 172 Cal. 541, 157 Pac. 604.

3. Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475; Watt v. Bekins Van & Storage Co., 35 Cal. App. 776, 171 Pac. 832. And see, generally, cases cited infra, § 34, note 6.

4. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48. See STATUTES.

5. Boin v. Spreckels Sugar Co.,

appeal becomes vested for the full time allowed by the statute then existent, and this right is not curtailed by subsequent statutes shortening the time.[6] As has already been stated, a different rule obtains where the right to appeal is involved.[7]

Constitutional provisions relating to remedy.—The rule is that statutes affecting the remedy only are applicable to actions pending at the time of their enactment.[8] In harmony with this rule, it was held that the amendment to section 4½ of article VI of the constitution, by which the appellate courts were forbidden to reverse unless of the opinion that the error complained of resulted in a miscarriage of justice, was applicable to pending appeals, although they may have been submitted prior to the adoption of this amendment.[9]

§ 10. Construction of Statutes.—The right of appeal is remedial and statutory provisions in aid thereof should be liberally interpreted.[10] They should not be unduly hampered with constructive restrictions which will cast doubt on the jurisdiction of the appellate court.[11] In determining whether a right of appeal is conferred, it is

155 Cal. 612, 102 Pac. 937; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, distinguished in Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039.

6. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, distinguished in Hester v. McMullan, 29 Cal. App. 664, 157 Pac. 521.

7. See supra, this section.

8. See STATUTES.

9. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

10. Schmitt v. White, 172 Cal. 554, 158 Pac. 216 (construing Code Civ. Proc., § 953a); Rigby v. Superior Court, 162 Cal. 334, 122 Pac. 958; Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Simmons v. Superior Court, 30 Cal. App. 252, 157 Pac. 817; Colburn v. Parrett, 25 Cal. App. 749, 145 Pac. 540 (holding notice of appeal sufficient as tested by a liberal construction of Code Civ. Proc., § 940); Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35; Continental Bldg. & Loan Assn. v. Woolff, 11 Cal. App. 677, 106 Pac. 107.

11. Rigby v. Superior Court, 162 Cal. 334, 122 Pac. 958; Simmons v. Superior Court, 30 Cal. App. 252, 157 Pac. 817.

the duty of a court to construe the statute so as to uphold the right, if it can be done without violating established rules of statutory construction, for it is not lightly to be presumed that the legislature intended to deny a right of appeal.[12] But if the legislature has clearly expressed its intention that there shall be no appeal in a particular case, the courts have no right to defeat this intention by torturing or disregarding the statutory language, but must give effect to the law.[13] This intention must be clearly expressed, however. And since the right of appeal exists and is available generally in special proceedings, the fact that the legislature does not in terms deprive the parties of such right in a particular special proceeding, or use some apt language in the act expressing such intention, such as making the judgment final or conclusive, clearly indicates that the right of appeal is not intended to be disturbed.[14]

B. APPELLATE JURISDICTION.

§ 11. In General.—In order to review a case on appeal, it is, of course, essential that the appellate court have jurisdiction of the subject matter of the appeal and of the parties thereto.[15] The jurisdiction of the appellate courts is defined by the constitution, and it is well settled that the legislature can neither add to nor subtract therefrom.[16] Parties cannot, by consent or stipulation, authorize the review of causes not within the juris-

12. People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; Appeal of Houghton, 42 Cal. 35; Fairchild v. Doten, 42 Cal. 125.

13. Bixler's Appeal, 59 Cal. 550; Appeal of Houghton, 42 Cal. 35; People v. Fowler, 9 Cal. 85.

14. People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481. See infra, § 16, as to right of appeal in special proceedings.

15. See infra, § 116, as to necessity of service of notice of appeal to the acquisition of jurisdiction over the person of the respondent.

16. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48 (appellate jurisdiction comes from the constitution, not from the statute). See infra, § 48; and see COURTS.

diction of the appellate court.[17] But the legislature has plenary powers over the subject of taking an appeal, and a noncompliance with the statute prescribing the steps to be taken goes to the jurisdiction of the appellate court,[18] and requires a dismissal of the appeal.[19] The particular subjects over which the appellate courts have jurisdiction are discussed elsewhere.[20]

§ 12. Existence of Actual Controversy.—It is well established that a court of review can only entertain appeals involving a real or substantial controversy between the parties to the suit, or which involve the determination of adversary rights.[1] An appellate court will not consider an appeal where the questions have become purely abstract and moot, and where no judgment which could be rendered therein would afford the parties any relief. The demands of actual, practical litigation are too pressing to permit the examination or discussion of purely academic questions.[2] A court is

17. Brooks v. Calderwood, 19 Cal. 124. See COURTS.

18. See infra, § 106, as to necessity of compliance with statute.

19. See infra, § 434.

20. See COURTS.

1. Wilson v. Chesley, 23 Cal. App. 630, 138 Pac. 958; South Spring Hill Gold Min. Co. v. Amador M. Gold Min. Co., 145 U. S. 300, 36 L. Ed. 712, 12 Sup. Ct. Rep. 921, see, also, Rose's U. S. Notes, (refusing to determine proceeding in error where the two corporations parties to the suit had come into the hands of the same persons, the litigation having ceased to be between adverse parties and the controversy being no longer a real one). See ACTIONS, vol. 1, p. 335, for discussion of this question as applied to trial courts.

2. Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 668, 161 Pac. 116; Wright v. Board of Public Works, 163 Cal. 328, 125 Pac. 353; United Real Estate & Trust Co. v. Barnes, 157 Cal. 515, 108 Pac. 306 (where it was not clear that the case was moot); Turner v. Markham, 156 Cal. 68, 103 Pac. 319; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031; Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683; Foster v. Smith, 115 Cal. 611, 47 Pac. 591 (quoting Matter of Manning, 139 N. Y. 446, 34 N. E. 931); Estate of Blythe, 108 Cal. 124, 41 Pac. 33; Leet v. Board of Supervisors, 5 Cal. Unrep. 573, 47 Pac. 595; Guardian Fire & L. Assur. Co. v. Thompson, 2 Cal. Unrep. 594, 9 Pac. 2; Weavering v. Schneider (Cal. App.), 186 Pac. 602; Wilson v. Chesley, 23 Cal. App. 630, 138

not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.[3] And the parties cannot by stipulation require the court to consider such questions.[4] Nor will the court entertain an appeal presenting only moot or abstract questions even where the liability for costs on appeal is involved,[5] but will dismiss the appeal.[6] Distinguishable from the last proposition is the case in which a judgment for costs is rendered. An appeal from a judgment in an action for abatement of a nuisance awarding costs and counsel fees will not be dismissed because of the abatement of the nuisance in fact. Such abatement does not satisfy the judgment for costs, and it is well settled that a party may appeal from that part of the judgment awarding costs.[7]

Pac. 958; Bernard v. Weaber, 23 Cal. App. 532, 138 Pac. 941; S. M. Bernard Co. v. City of Los Angeles, 18 Cal. App. 626, 124 Pac. 88; Munger's Laundry Co. v. Rankin, 8 Cal. App. 448, 97 Pac. 95; Mendocino County v. Peters, 2 Cal. App. 34, 82 Pac. 1124. See infra, § 13, as to consideration of moot questions on review.

3. Estate of Blythe, 108 Cal. 124, 41 Pac. 33 (quoting People of State of California v. San Pablo etc. R. R. Co., 149 U. S. 308, 37 L. Ed. 747, 13 Sup. Ct. Rep. 876, see, also, Rose's U. S. Notes); Wilson v. Chesley, 23 Cal. App. 630, 138 Pac. 958. See infra, § 24, as to consideration of matters occurring subsequent to the rendition of the judgment appealed from.

4. Hubbard v. Justice's Court, 5 Cal. App. 90, 89 Pac. 865 (upon an appeal from a judgment of a superior court denying a writ of prohibition in which the jurisdiction of the justice's court has become a moot question because of a determination that the remedy by appeal is adequate, counsel cannot by a stipulation that the only question to be submitted is that of jurisdiction submit it for determination).

5. Turner v. Markham, 156 Cal. 68, 103 Pac. 319; Nelson v. Nelson, 153 Cal. 204, 94 Pac. 880; Estate of Blythe, 108 Cal. 124, 41 Pac. 33; Weavering v. Schneider (Cal. App.), 186 Pac. 602; Wilson v. Chesley, 23 Cal. App. 630, 138 Pac. 958. Contra, Cohen v. Gray, 54 Cal. 595.

6. See infra, §§ 13, 437.

7. White v. Gaffney, 1 Cal. App. 715, 82 Pac. 1088. See Bernard v. Weaber, 23 Cal. App. 532, 138 Pac. 941, holding that no judgment was rendered for costs in the case at bar, it being recited in the record

§ 13. When Questions Become Moot.—The questions involved in an appeal may become moot and abstract, by reason of some act of the parties, an act of the court, by lapse of time,[8] by act of legislature, by act of God, and perhaps in other ways.[9] Illustrative of the first class mentioned, an appeal from an order refusing to grant or dissolving an injunction against the performance of a single act will be dismissed if the act is done pending the appeal.[10] For instance, an appeal from an order dissolving an injunction against the issuance of municipal improvement bonds presents only a moot question if the bonds are issued pending the appeal. In this connection the appellate court will not assume that a condition once shown to exist will continue, as against an allegation in the complaint that the defendant will issue the bonds unless restrained and against the presumption that the defendant, who is an officer of the municipality, has performed the duty imposed upon him. The appellate court will assume the allegation to be true and dismiss the appeal.[11] So, also, where the parties have settled between themselves all the matters in dispute in an action, the appeal from a judgment therein

that the defendant recover costs of suit amounting to the sum of —— dollars, and that therefore the appeal would not be retained on this ground. See infra, § 25, as to appeal from part of judgment.

8. Board of Education v. Common Council, 1 Cal. App. 311, 82 Pac. 89 (where pending an appeal from a judgment in a proceeding to compel the levy of a tax, the time in which such tax could be levied has passed).

9. Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683 (where a superintendent of an almshouse removed by the state board of health brought suit against them for reinstatement, and where pending an appeal from a judgment against him, the board was deprived of authority over the almshouse, the questions presented become moot, and the judgment will be affirmed).

10. Wright v. Board of Public Works, 163 Cal. 328, 125 Pac. 353; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031 (where a taxpayer sued to enjoin the holding of an election, and the election was held before the determination of the appeal); Bernard v. Weaber, 23 Cal. App. 532, 138 Pac. 941.

11. Bernard v. Weaber, 23 Cal. App. 532, 138 Pac. 941.

no longer presents a contest involving the determination of adversary rights, and will not be retained.[12] And a like result follows where pending an appeal involving the title to land all the parties thereto transfer their respective disputed interests in the property involved to a third person in whom the full legal title is merged.[13]

With reference to the second class, the decision of one appeal may make the questions in another appeal in the same cause moot and render a decision thereof ineffectual.[14] Thus, in an action for an injunction, the affirmance of a judgment for the defendant renders moot the questions presented by an appeal from an order granting[15] or dissolving[16] a temporary injunction. And where a party appeals from a decree of distribution and from an order denying a new trial in a proceeding to determine heirship, the questions on the latter appeal become moot after a determination on the former that the appellant had no interest in the matter of distribution.[17]

Illustrative of the third class mentioned, when a person is enjoined from performing certain acts for a prescribed period, and such period has elapsed before the hearing

12. Nelson v. Nelson, 153 Cal. 204, 94 Pac. 880; In re Tucker, 7 Cal. Unrep. 243, 83 Pac. 814; Bloom v. Michigan Salmon Min. Co., 11 Cal. App. 122, 104 Pac. 324 (refusing to dismiss, as there was no showing that the settlement had been consummated by payment). See infra, § 64, as to loss of right to appeal by a compliance with the judgment.

13. Wilson v. Chesley, 23 Cal. App. 630, 138 Pac. 958.

14. Read v. San Diego Union Co., 6 Cal. Unrep. 845, 67 Pac. 1 (where there are two appeals from different orders in a cause denying a change of venue, one appeal presents merely a moot case on the determination of the other by directing a change of venue); Mendocino County v. Peters, 2 Cal. App. 34, 82 Pac. 1124 (where the affirmance of a judgment in a condemnation suit rendered academic the questions on an appeal from an order after judgment with reference to the use of the property pendente lite).

15. Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 674, 161 Pac. 119.

16. S. M. Bernard Co. v. City of Los Angeles, 18 Cal. App. 626, 124 Pac. 88.

17. Estate of Blythe, 108 Cal. 124, 41 Pac. 33.

of an appeal from the order granting the injunction, the appeal presents merely an abstract question which does not arise upon any existing facts or rights, and must therefore be dismissed.[18] So, also, an appeal from a judgment of mandate requiring the issuance of a license will be dismissed when the license has expired before the appeal is heard.[19]

When in an appeal in a certiorari case to annul an order revoking a personal license the appellant dies, it may well be said that the questions were rendered moot by an act of God.[20] The act of the legislature in repealing a statute renders moot the questions involved in an appeal from an order dissolving an injunction restraining a party from proceeding thereunder.[1]

§ 14. Effect of Want of Jurisdiction in Trial Court.— Jurisdiction of the appellate courts over judgments of superior courts includes those in which that court improperly assumed jurisdiction as well as those in which it was properly entertained.[2] And when the superior court has assumed jurisdiction and rendered an affirmative judgment, the appeal will not be dismissed for want of jurisdiction in the superior court.[3] The jurisdiction of appellate courts is revisory of the action of the superior court, and is to be exercised by affirming, correcting,

18. Munger's Laundry Co. v. Rankin, 8 Cal. App. 448, 97 Pac. 95.

19. Leet v. Board of Supervisors, 5 Cal. Unrep. 573, 47 Pac. 595.

20. Hannon v. Harper, 9 Cal. App. 260, 98 Pac. 685 (employment agency license).

1. Horton v. City of Los Angeles, 119 Cal. 602, 51 Pac. 956.

2. Carr v. Superior Court, 147 Cal. 227, 81 Pac. 515; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826; De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45; Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49 (refusing prohibition because of remedy by appeal); Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206. See infra, § 40, as to appealability of void judgments.

3. Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

modifying or setting aside its judgments; and if the appeal were dismissed, the judgment would remain as originally pronounced.[4] Upon this principle and because the remedy by appeal was adequate, the appellate courts have a number of times refused to issue a writ of prohibition, notwithstanding a question of jurisdiction was involved.[5] If the rule were otherwise, whenever a defendant chooses to raise a point of jurisdiction either of the person or of the subject matter, he could by prohibition stop the ordinary progress of actions until the jurisdictional question is passed upon by an appellate court, and thus, the appellate court would in numerous cases be converted into a nisi prius court.[6]

Application of rule.—The rule just enunciated has been applied in a variety of cases. Thus, it has been held that an appellate court will entertain an appeal from a judgment in a proceeding to determine heirship notwithstanding the proceeding was instituted before the expiration of one year from the issuance of letters of administration, and therefore without the jurisdiction of the superior court.[7] It will also entertain an appeal from a judgment in a taxpayer's action where the trial court, notwithstanding a finding that the plaintiff was neither a citizen nor taxpayer, renders an affirmative judgment upon the merits.[8] Again, the failure to take proper steps to procure a new trial may deprive the trial court

4. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

5. Carr v. Superior Court, 147 Cal. 227, 81 Pac. 515; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765 ("If, as contended, the superior court is without jurisdiction, there is, of course, a remedy by appeal for any adverse judgment affecting petitioner, and it is not sufficient ground for interfering by prohibition that the trial will be expensive and troublesome"); Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826; Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49. See PROHIBITION.

6. Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49.

7. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

8. McConoughey v. City of San Diego, 128 Cal. 366, 60 Pac. 925 (case reversed with directions to the trial court to dismiss the action).

of jurisdiction of the proceedings, but it does not defeat the jurisdiction of the appellate court, and necessitate a dismissal of an appeal from an order on such motion on the ground that the court has not acquired jurisdiction to hear it.[9] So, also, whether or not a failure of a foreign corporation to comply with the statutory prerequisites to the bringing of an action goes to the jurisdiction of the trial court, an appeal lies from any adverse judgment and precludes the issuance of a writ of prohibition, if the remedy by appeal is adequate.[10] Where, notwithstanding the fact that an action brought in the justice's court involves more than three hundred dollars and is therefore beyond his jurisdiction, the superior court entertains the case on appeal and renders judgment in an amount exceeding three hundred dollars, the supreme court has jurisdiction of an appeal from that judgment, though it be void.[11] On the other hand, a contention that a simple action at law is within the exclusive jurisdiction of the justice's court because the demand does not amount to three hundred dollars, when well founded, defeats an appeal to the supreme court or a district court of appeal, as neither court has jurisdiction where the amount involved is less than that amount.[12]

C. DECISIONS APPEALABLE.

I. General Principles.

§ 15. Introductory.—It is elementary that the decisions which are appealable under the code are designated

9. In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082; Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221, (where it was claimed that the notice of intention was not served or filed in the time allowed by law).

10. Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765.

11. De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45. See infra, § 17.

12. Dungan v. Clark, 159 Cal. 30, 112 Pac. 718. See infra, § 48.

as judgments and orders. If no judgment or order has been rendered or made, there is nothing from which to appeal.[13] A judgment is defined by the code to be the final determination of the right of the parties in an action or proceeding.[14] And an order is defined to be a direction of a court or judge, made or entered in writing, and not included in a judgment.[15] It is clear that these provisions do not embrace the findings of fact and conclusions of law,[16] or a written request by a plaintiff to dismiss his action,[17] and that therefore an appeal will not lie from them. So, also, an appeal taken from an order for judgment rather than from the judgment itself is premature.[18] An order to show cause is a form of notice, and it is questionable whether such an order is appealable though made after judgment.[19] A refusal of a court to act upon an application for an order because, for instance, it deems itself to be without jurisdiction to do so, is not an "order" and cannot be the subject of an appeal. The remedy of the party in such case is by mandamus to compel the court to take action in the matter.[20] An alleged

13. Miller v. Sharpe, 54 Cal. 590; San Diego Inv. Co. v. Crane, 40 Cal. App. 393, 180 Pac. 837.

14. Code Civ. Proc., § 577. See JUDGMENTS.

15. Code Civ. Proc., § 1003. See infra, § 24, as to appeals from special orders after final judgment.

16. Estate of Funkenstein, 170 Cal. 594, 150 Pac. 987; Miller v. Sharpe, 54 Cal. 590; Lorenz v. Jacobs, 53 Cal. 24; Thompson v. Lynch, 43 Cal. 482; San Diego Inv. Co. v. Crane, 40 Cal. App. 393, 180 Pac. 837.

17. Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171.

18. Preston v. Hearst, 54 Cal. 595; Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

19. McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730 (in which the court conceded for the purpose of the appeal that the order was appealable, and holding the subsequent final order made as a result of the hearing is not reviewable on the appeal, no appeal having been taken from the latter order). See Morehouse v. Pacific Hdw. & Steel Co., 177 Fed. 337, 100 C. C. A. 647, citing the McAuliffe case and stating the order to show cause is in the nature of process, and, in jurisdictions where interlocutory orders are made appealable if they affect substantial rights, it is held that an order to show cause is not of that nature.

20. Greehn v. Shumway, 73 Cal. 263, 14 Pac. 863; People v. De La Guerra, 43 Cal. 225. See MANDAMUS.

order which merely declares that an injunction is no longer in force and which does not by its terms purport to dissolve an injunction previously granted or have any effect upon the injunction is not a "direction" of a court or judge and is not therefore appealable.[1]

The judgments and orders which are appealable in California are enumerated in section 963 of the Code of Civil Procedure.[2] They are divided in this part of the article into three distinct classes: 1. Final judgments of superior courts;[3] 2. Certain enumerated orders;[4] and 3. Certain specified judgments or orders made in probate proceedings.[5] The first and second classes embrace judgments and orders other than those made in probate proceedings, and the third class embraces only such as are made in such proceedings.[6] Of course, the question as to the appealability of any particular judgment or order is ultimately to be determined by the court to which an appeal therefrom is taken.[7] As affecting the determination of this question it is well settled that the rule that an appellate court will not disturb the action of a trial court in the exercise of its discretionary powers has no application.[8] If a particular order is not appealable, an attempt to take an appeal therefrom does not confer upon an appellate court power or authority to review it;[9] the appellate court is without jurisdiction of the appeal and must dismiss it.[10]

1. Devlin v. Rydberg, 132 Cal. 324, 64 Pac. 396. See infra, § 167, as to necessity for entry of judgment or order before appeal.

2. Hester v. McMullan, 29 Cal. App. 664, 157 Pac. 521 (holding section 939 merely limits the time to appeal and does not have the effect of enlarging the right of a party to appeal in cases other than those specified in section 963 of the code).

3. See infra, §§ 19–22.

4. See infra, § 23.

5. See infra, §§ 43–47.

6. In re Calahan's Estate, 60 Cal. 232. See infra, § 43.

7. Hale & Norcross Silver Mining Co. v. Fox, 122 Cal. 56, 54 Pac. 270.

8. Luck v. Luck, 83 Cal. 574, 23 Pac. 1035.

9. Sherman v. Standard Mines Co., 166 Cal. 524, 137 Pac. 249.

10. See infra, § 18 et seq.

§ 16. Final Judgments "In Actions or Special Proceedings."—Subdivision 1 of section 963 of the Code of Civil Procedure provides that an appeal may be taken

"From a final judgment entered in an action or special proceeding, commenced in a superior court or brought into a superior court from another court."

In order that a judgment may be appealable by virtue of this subdivision, it must be (1) a final judgment, (2) a judgment entered in an action or special proceeding, and (3) the action or special proceeding must have been commenced in the superior court or brought into a superior court from another court. These requisites will be separately considered. With reference to the second requisite, which will be treated first, for convenience, it is clear that a judgment to be appealable must be one rendered in an action or special proceeding. An action, as defined by the code, is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, or the redress or prevention of a wrong.[11] Every other remedy is a special proceeding.[12] No distinction is made by the code between the right to appeal in cases which were once denominated cases at law and those once called cases in equity.[13] But inasmuch as the code makes special provision for appeals in probate proceedings, the terms "action" and "special proceedings" as used in subdivision 1 of section 963 of the Code of Civil Procedure do not include probate proceedings.[14]

Special proceedings.—The provision of the Code of Civil Procedure under discussion confers the right of appeal

11. Code Civ. Proc., § 22. See ACTION, vol. 1, p. 306.

12. Code Civ. Proc., § 23. See ACTION, vol. 1, p. 325 et seq.

13. Hallock v. Jaudin, 34 Cal. 167. As to classification of actions as legal and equitable, see ACTIONS, vol. 1, p. 318.

14. In re Smith's Estate, 98 Cal. 636, 640, 33 Pac. 744 (holding this subdivision applies only to those judgments known at common law as final judgments); In re Calahan's Estate, 60 Cal. 232. See infra, § 43.

in special proceedings generally, and therefore, in the absence of any provision in a statute providing for a particular special proceeding and denying the right of appeal from the judgment therein, an appeal may be taken by virtue of this general provision.[15] A proceeding to condemn land for public purposes is a special proceeding, as the court acts judicially therein, a petition is filed setting up the grounds upon which the right to acquire the land is claimed, and the parties interested are summoned to appear and answer; consequently a final judgment therein is appealable as a final judgment in a special proceeding.[16] A judgment upon an award is a judgment upon a proceeding within the meaning of the statute.[17] And where two suits are brought in different states against a common defendant and the plaintiff in one action intervenes in the other and procures an order directing the delivery of books of the defendant to him for use in his own action, the intervention is in effect a special proceeding being spent by the order made and the order is appealable as a final judgment in a special proceeding.[18]

The code classifies proceedings to obtain the issuance of the writs of mandamus, prohibition and review or certiorari, as special proceedings, consequently appeals may be taken from the judgments therein as final judgments in special proceedings.[19] So, also, because the following are special proceedings, appeals may be taken from the

15. Application of Herman (Cal.), 191 Pac. 934 (decision in a proceeding by a publisher to have the standing of his newspaper determined as one of general circulation is appealable as a judgment in a special proceeding); People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; Morton v. Broderick, 118 Cal. 474, 50 Pac. 644.

16. California Southern R. R. Co. v. Southern Pacific R. R. Co., 65 Cal. 295, 4 Pac. 13; People v. Pfeiffer, 59 Cal. 89; Stockton & C. R. Co. v. Galgiani, 49 Cal. 139; Phillips v. Pease, 39 Cal. 582; San Francisco & S. J. R. R. Co. v. Mahoney, 29 Cal. 112; Sacramento, P. & N. R. R. Co. v. Harlan, 24 Cal. 334. See EMINENT DOMAIN.

17. Fairchild v. Doten, 42 Cal. 125. See ARBITRATION AND AWARD.

18. Adams v. Woods, 18 Cal. 30.

19. See infra, § 39.

final judgments therein: a proceeding to try the validity of a corporate election;[20] a proceeding to oust an officer because of malfeasance in office;[1] a proceeding brought under a statute authorizing the removal of boards of supervisors for neglecting to fix water rates;[2] and a proceeding instituted pursuant to section 10 of the Bank Commissioners' Act to force a bank into involuntary liquidation.[3] But the presentation by a reporter of his claim for his fees for reporting and for transcripts in criminal cases pursuant to section 274 of the Code of Civil Procedure is neither an action nor special proceeding, and no appeal lies from a judgment thereon.[4]

§ 17. In Actions Commenced in or Brought into Superior Court.—With reference to the third requisite, it is essential that the judgment to be appealed from be one rendered in an action or special proceeding "commenced in a superior court, or brought into a superior court from another court."[5] The mere fact that a case is brought into the superior court by an appeal from a judgment of a justice's court cannot furnish a test of the appellate jurisdiction of the supreme court or district court of appeal. If the case is one in which the latter courts have appellate jurisdiction under the constitution, the practice of taking an appeal first to the superior court and next to the supreme court or district court of appeal is prob-

20. Lord v. Dunster, 79 Cal. 477, 21 Pac. 865; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237 (the fact that the proceeding was instituted before the judge instead of the court does not prove it was not judicial in character, as the legislature is not prohibited from conferring upon judges authority to determine actions and proceedings at chambers).

1. Covarrubias v. Board of Supervisors of Santa Barbara County, 52 Cal. 622.

2. Morton v. Broderick, 118 Cal. 474, 50 Pac. 644.

3. People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; People v. Bank of Mendocino, 133 Cal. 107, 65 Pac. 124. See BANKS.

4. Pipher v. Superior Court, 3 Cal. App. 626, 86 Pac. 904.

5. Code Civ. Proc., § 963, subd. 1. See supra, § 16, as to requisites generally.

ably correct under this provision of the code. The question, however, is not as to the correct practice in such case, but one as to the jurisdiction of the appellate courts under the constitution.[6] Under this instrument, neither the supreme court nor the district court of appeal has jurisdiction of an appeal from a judgment for money rendered by the superior court on appeal from the justice's court, when the demand is less than three hundred dollars, and the title or possession of real estate and the legality of any tax, impost, assessment, toll or municipal fine is not involved.[7] Therefore, it follows that the appellate jurisdiction of the supreme court and of the district court of appeal over the judgments of the superior court is limited to cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction. Judgments of a superior court in the latter case cannot be reviewed upon an appeal,[8] or upon writ of

6. Edsall v. Short, 122 Cal. 533, 55 Pac. 327.

7. O'Meara v. Hables, 163 Cal. 240, 134 Pac. 1003; Dungan v. Clark, 159 Cal. 30, 112 Pac. 718; Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 63 Pac. 346; Edsall v. Short, 122 Cal. 533, 55 Pac. 327 (quaere, as to rule in actions of forcible entry and detainer and to foreclose liens upon personal property where the justice's court and the superior court have concurrent jurisdiction); Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186; Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. 941; Sweet v. Tice, 45 Cal. 71; Hackley v. Craig, 2 Cal. Unrep. 289, 3 Pac. 494; Tracy v. Sumida, 31 Cal. App. 716, 161 Pac. 503; Hillger v. Zenrick, 25 Cal. App. 604, 144 Pac. 980; Hesperia Land & Water Co. v. Gardner, 4 Cal. App. 357, 88 Pac. 286; Pool v. Superior Court, 2 Cal. App. 533, 84 Pac. 53; Cox v. Southern Pacific Co., 2 Cal. App. 248, 83 Pac. 290 (an action for damages for negligence in which a judgment for two hundred and fifty dollars was rendered). See Webb v. Hanson, 3 Cal. 65, holding no appeal lay from a judgment of a district court on appeal from the court of sessions. See White v. Lighthall, 1 Cal. 347; Warner v. Kelly, 1 Cal. 91; and Warner v. Hall, 1 Cal. 90, holding that the constitution conferred on the supreme court appellate jurisdiction over judgments of county courts on appeal from justices' courts. See, also, COURTS, and infra, §§ 48, 49.

8. Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 63 Pac. 346; Edsall v. Short, 122 Cal. 533,

error.[9] And the fact that a superior court on appeal permits an amendment which has the effect of converting the action into one over which the justice's court had no jurisdiction, notwithstanding its lack of power to do so, does not make its judgment appealable.[10]

The supreme court is without jurisdiction even where the action is brought to foreclose a lien upon personal property, and is therefore in equity, for the constitution specifically excepts from the appellate jurisdiction of the supreme court over equity cases those cases which arose in the justices' courts.[11] When, however, the title or possession of real property or the legality of a tax, impost, assessment or tax is involved, and the case is certified to the superior court, such court exercises original, not appellate jurisdiction, and its judgment in the action is appealable.[12] The fact that such an action is brought into the superior court by appeal instead of the method prescribed constitutes merely an irregularity in the manner in which jurisdiction is obtained. The superior court in such case exercises original jurisdiction, and if it, with-

55 Pac. 327; Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186 (where the court says: "Cases originating in justice's court cannot be brought by appeal to this court, except cases of forcible entry and detainer, cases involving the title or possession of real property or the legality of a tax, impost, assessment, toll or municipal fine." It must be noted in this connection that the constitution confers upon the district court of appeal appellate jurisdiction in cases of forcible and unlawful entry and detainer "except such as arise in justices' courts." Const., art. VI, § 4. Also it must be noted that section 112 of the Code of Civil Procedure excepts from the jurisdiction of justices' courts cases in which the title to or possession of real property is involved, and the legality of a tax, impost, assessment, toll, or municipal fine is put in issue); Tracy v. Sumida, 31 Cal. App. 716, 161 Pac. 503; Pool v. Superior Court, 2 Cal. App. 533, 84 Pac. 53; Cox v. Southern Pacific Co., 2 Cal. App. 248, 83 Pac. 290.

9. Pool v. Superior Court, 2 Cal. App. 533, 84 Pac. 53.

10. Tracy v. Sumida, 31 Cal. App. 716, 161 Pac. 503.

11. Edsall v. Short, 122 Cal. 533, 55 Pac. 327.

12. Dungan v. Clark, 159 Cal. 30, 112 Pac. 718; Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 63 Pac. 346; Doherty v. Thayer, 31 Cal. 140. See JUSTICES OF THE PEACE.

out objection to this irregularity, tries the action and renders judgment, the judgment rendered is cognizable by the appellate courts as if it had been begun in the superior court.[13]

§ 18. What Constitutes Finality in General.—A judgment may be a final adjudication in different senses. In one sense, it may be final with reference to the property or rights affected, so that no further proceedings in a cause by appeal or otherwise may be taken.[14] In another sense, a judgment may be final as to the court which renders it without being final as to the subject matter, and, as such, be the subject of an appeal, without being final with reference to the property or rights affected;[15] in other words, the judgment is a final determination of the particular suit, without being a final determination of the rights of the parties.[16] A final judgment is distinguished from an interlocutory order or judgment. It is in the latter sense that the term "final judgment" is used in the provision of the code under discussion. It is sometimes very difficult to determine whether a particular judgment or decree is a "final judgment" within the meaning of that term as used in the statutes concerning appeals. It is clear that the question is not to be determined by technical definitions and verbal criticisms on the terms and phrases in which judgments have been or may be expressed, but is to be determined by the substance and effect of the adjudication in question.[17] It matters

13. City of Madera v. Black, 181 Cal. 306, 184 Pac. 397; De Jarnatt v. Marquez, 132 Cal. 700, 64 Pac. 1090; S. C., 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562.

14. Gillmore v. American Cent. Ins. Co., 65 Cal. 63, 2 Pac. 882; Bixler's Appeal, 59 Cal. 550; Belt v. Davis, 1 Cal. 134.

15. Gilmore v. American Central Ins. Co., 65 Cal. 63, 2 Pac. 882; Hills v. Sherwood, 33 Cal. 474; Colusa & H. R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 Pac. 1011.

16. Belt v. Davis, 1 Cal. 134.

17. Belt v. Davis, 1 Cal. 134, quoting from Clason v. Shotwell,

not in what form the determination of a suit is put, so that it embodies the final action of the court.[18] An adjudication which is in form an order may be deemed a final judgment and vice versa.[19]

However, a general guide on the question of finality must be found and the courts in a number of cases have given definitions of final judgments. Many of these definitions, while true so far as the particular case in which they are given, are not sufficiently comprehensive when applied to facts not before the court. For example, in the first case in the reports in which the question arose, the court said in substance: An order is a decision made during the progress of a cause, either prior to or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. But a judgment is the determination of the court upon the issues presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject matter in litigation, and puts an end to the suit.[20] So, also, in later cases, it has been held that a judgment is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.[1] And it has several times been said that the term

12 Johns. (N. Y.) 31; Peterson v. Lightfoot (Cal. App.), 191 Pac. 48.

18. Zoller v. McDonald, 23 Cal. 136.

19. Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616; Phillips v. Pease, 39 Cal. 582; Zoller v. McDonald, 23 Cal. 136 (order dismissing appeal from justice's court); Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882 (order dismissing an action). See infra, § 27.

20. Loring v. Illsley, 1 Cal. 24, explained in Belt v. Davis, 1 Cal. 134.

1. Doudell v. Sloo, 159 Cal. 448, 114 Pac. 579; Stockton Combined H. & Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Gianelli v. Briscoe, 40

"final judgment" evidently means the ultimate or last judgment which puts an end to a suit or proceeding.[2]

This is the ordinary definition of the term, and while it is true as far as it goes, the definition is too restricted, as the term has a somewhat more comprehensive meaning. It is well established that a judgment is final which determines a particular case though it does not finally decide upon the rights which are litigated.[3] Thus, for instance, a judgment of nonsuit, other than a voluntary nonsuit, is a final judgment, even though no costs be awarded against the plaintiff.[4] So, also, an order of the superior court dismissing an appeal from a justice's court is a final judgment within the rule.[5]

The general test applicable in determining whether a judgment is final or merely interlocutory therefore, is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only. But if no further questions can come before the court after a judgment has been entered, except such as are necessary to be determined in carrying the judgment into effect, the judgment is final.[6]

Cal. App. 532, 181 Pac. 105, quoting Klever v. Seawell, 65 Fed. 373, 12 C. C. A. 653. See Etchebarne v. Roeding, 89 Cal. 517, 26 Pac. 1079, holding an order not to be a final judgment as to which no execution or other writ could have been issued for the purpose of enforcing the rights of either party against the other.

2. Nolan v. Smith, 137 Cal. 360, 70 Pac. 166; In re Smith's Estate, 98 Cal. 636, 33 Pac. 744; Stockton Combined H. & Agr. Wks. v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

3. Sacramento, P. & N. R. R. Co. v. Harlan, 24 Cal. 334; Zoller v. McDonald, 23 Cal. 136; Belt v. Davis, 1 Cal. 134.

4. Belt v. Davis, 1 Cal. 134. See infra, § 27. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

5. Zoller v. McDonald, 23 Cal. 136.

6. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; California Southern R. R. Co. v. Southern Pacific R. R. Co., 67 Cal. 59, 7 Pac. 123; Clark v. Dunnam, 46 Cal. 204; Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393. See Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161 (holding an order made in a stockholder's suit to wind up a corporation, which directs a sale and dis-

§ 19. Finality as to Issues and Parties.—In accordance with the tests already given, a judgment is not ordinarily final which does not dispose of all the necessary issues of law and fact and completely dispose of the case so far as the court has power to do so.[7] Our system of procedure contemplates that there shall be but one final judgment in a case,[8] and in the absence of a clear showing, it is not to be presumed that a trial court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy.[9] It is a general rule that to be final a judgment must dispose of the rights of all the parties to the action in relation to the matter in controversy. In general, there must be an express adjudication of the subject matter of the controversy as to all the parties plaintiff and all of the parties defendant, otherwise there is no final disposi-

tribution of the corporate property, is a final judgment, as it has the effect of taking the property sold from the possession and control of the court and the parties, and puts the money distributed beyond the power of the court and out of the litigation, so that it could not be regained or affected by subsequent proceedings); Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254 (holding an order confirming a referee's report and adjudging that the money be paid over to the plaintiff is a final judgment). And see Chapman v. Atlantic Trust Co., 119 Fed. 257, 56 C. C. A. 61 (holding an order refusing to settle a receiver's accounts to be final).

7. Baxter v. Boege, 173 Cal. 589, 160 Pac. 1072 (approving Freeman on Judgments, 4th ed., § 34); Nolan v. Smith, 137 Cal. 360, 70 Pac. 166 (quoting Freeman on Judgments); Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365 (not deciding the point).

8. Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579; Nolan v. Smith, 137 Cal. 360, 70 Pac. 166; Stockton etc. Agr. Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; Williams v. Conroy, 52 Cal. 414 (a decision directing a trustee to pay trust funds into court and reserving the question as to the distribution of the funds among the beneficiaries until later is not final); Gianelli v. Briscoe, 40 Cal. App. 532, 181 Pac. 105.

9. Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579 (holding an injunction order in an interlocutory judgment is not a final judgment, though perpetuated in the final judgment. The former injunction is deemed an injunction pendente lite, which expires on rendition of the final decree); Gianelli v. Briscoe, 40 Cal. App. 532, 181 Pac. 105.

tion of the matters litigated between the parties.[10] Accordingly, where the asserted liability of the defendants in an action is joint and several, as in an action against an officer and his sureties, a judgment upon a demurrer dismissing an action in favor of some of the defendants and leaving it pending as to others is not a final appealable judgment.[11] This rule, however, is not absolutely true in the broad sense in which it has just been stated. For example, in an action to set aside an administrator's deed brought against the administrator and subsequent purchasers of his grantee and mortgagees claiming thereunder, a judgment dismissing the action as to the grantee was held to be a final judgment, from which the plaintiff may appeal. The true rule is that any set of parties whose interests are identical must have the controversy as to them settled before any final judgment may be entered. No given set of parties can try a case piecemeal. But separate parties, if the court in its discretion so directs, may litigate their controversies separately and proceed to final judgment without waiting for judgments as to other parties.[12]

The fact that a particular judgment may not be binding on one of the parties to the action does not prevent it from being a final judgment within the code provision relating to appeals. Thus, a judgment in favor of a railroad in condemnation proceedings finally determining the rights of the parties therein is a final judgment, notwithstanding the fact that the award and judgment may not

10. Anglo-California Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803; Nolan v. Smith, 137 Cal. 360, 70 Pac. 166; Gulf City St. Ry. etc. Co. v. Becker (Tex. Civ. App.), 23 S. W. 1015.

11. Nolan v. Smith, 137 Cal. 360, 70 Pac. 166; Dabney Oil Co. v. Providence Oil Co., 29 Cal. App. 251, 155 Pac. 114; Voorhis v. Western Union etc. Assn., 59 Mo. App. 53; Caulfield v. Farish, 24 Mo. App. 110. See SURETYSHIP.

12. Baxter v. Boege, 173 Cal. 589, 160 Pac. 1072.

be binding on the company so as to compel it to take the land and pay the award.[13]

§ 20. **Where Further Orders are Necessary.**—It is a settled rule that if a superior court makes a decree fixing the liability and rights of the parties and refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final.[14]

But a judgment which adjudicates the whole matter in litigation is none the less final because some future orders of court may be necessary to carry it into effect,[15] or because some independent branch of the case is reserved for future decision,[16] or because an account is directed to ascertain what sum is due from one to the other as a result of the decision made.[17] Thus, a decree for the dissolution of a partnership, a sale of all its property and effects, the payment of certain debts, and directing the payment of any balance remaining to the partners in a certain proposition fixed by the decree, is a final judgment, although the balance due the receiver appointed to sell the property and the exact amount of the surplus for division is not ascertained. The decree determines all the essential matters in controversy and nothing remains to be done but to enforce by execution what had been determined by the judgment.[18] So, also, a judgment

13. Phillips v. Pease, 39 Cal. 582. See EMINENT DOMAIN.

14. California Nat. Bank v. Stateler, 171 U. S. 447, 43 L. Ed. 233, 19 Sup. Ct. Rep. 6 see, also, Rose's U. S. Notes.

15. Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508 (holding a judgment removing officers of a corporation and settling the affairs of the corporation is a final judgment, though it provides also for the appointment of a receiver to carry out its provisions, and authorizes him to sell stock and collect money due and bring the proceeds into court).

16. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696. See People v. Bank of Mendocino County, 133 Cal. 107, 65 Pac. 124.

17. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696 (quoting Freeman on Judgments, § 24).

18. Peterson v. Lightfoot (Cal. App.), 191 Pac. 48; Clark v. Dunnam, 46 Cal. 204, followed in

dissolving a partnership directing a sale of the firm property and providing for a distribution of the proceeds is a final judgment, although the compensation of the receiver and the amount to be paid creditors are reserved for future determination. The rights of the parties are fully established by the judgment, and nothing remains to be done except the mere ascertainment of the amounts due to others than the parties on account of fees for services in the action, and debts owing by the parties and partners, and to see that the decree already made is executed. Upon the subsequent ascertainment of the amounts due to others by force of the judgment, the parties will be entitled to the portions of the remainder adjudged to belong to them.[19] On the other hand, however, a decree is not final which settles only the original terms of a partnership, and directs the taking of an account, but does not determine whether any specific sum or proportion is due the partners, or determine whether any or what part of the property should be sold.[20] So, also, where a partner converts the profits of a business, a decree dissolving the partnership and directing an account of the amount converted, a sale of the partnership property and division of the proceeds of the sale and the amount converted is not a final decree, because the amount of the profits of the business converted and the

Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696, and distinguished in Gianelli v. Briscoe, 40 Cal. App. 532, 181 Pac. 105. See White v. Conway, 66 Cal. 383, 5 Pac. 672, distinguishing Clark v. Dunnam, 46 Cal. 204, and holding that such a decree is final only when all the consequential directions depending upon the result of the referee's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court. See, also, PARTNERSHIP.

19. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; Williams v. Reed (Cal. App.), 185 Pac. 515.

20. Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579; Harris v. San Francisco Sugar Refining Co., 41 Cal. 393; Gray v. Palmer, 9 Cal. 616. See Hinds v. Gage, 56 Cal. 486, to same effect. See Wiegand v. Copeland, 14 Fed. 118, 7 Sawy. 442, not deciding whether a similar decree is final.

amount thereof the other partners are entitled to has not been ascertained. If this amount were ascertained, the case would be within the rule of the cases already cited in this section.[1]

A conditional order is not final but is interlocutory in character and contemplates a further order granting or denying the motion absolutely upon the performance or nonperformance of the condition imposed. An order granting a motion to set aside a default upon the payment within a designated time of a specified sum as costs is an order of this character and is not appealable.[2]

§ 22. **Final Determination of Collateral Matters.**—A final judgment, however, is not necessarily the last one in an action. The code provides for an appeal from "a final judgment," not from "the" final judgment in an action.[3] While a decree finally determining all the issues presented by the pleadings is undoubtedly a final decision, the term "final judgment" is not limited to such decisions. It applies also to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy and finally settling the same.[4] As said in a comparatively recent case, a judgment that is conclusive of any question in a case is final as to that question.[5] This rule is not in violation of the doctrine that a judgment to be final must dispose of the rights of all the parties to the action in relation to the matter in controversy, as the order finally

1. Gianelli v. Briscoe, 40 Cal. App. 532, 181 Pac. 105.

2. Aalwyn's Law Institute v. San Francisco, 39 Cal. App. 365, 178 Pac. 966 (citing to the point that such an order is not final, Wolf v. Canadian Pac. Co., 123 Cal. 535, 56 Pac. 453; and Armstrong v. Superior Court, 63 Cal. 410).

3. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

4. Cline v. Superior Court, 35 Cal. App. 150, 169 Pac. 453.

5. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.

disposes of the collateral proceeding, the matter in controversy.[6]

The rule deducible from the authorities is that those orders in collateral proceedings are final and appealable which require the payment of money by the party complaining,[7] or which require the doing of an act by or against him.[8] But those orders are not final which in nature are such as to be subject, before enforcement or execution, to the further action of the court either by decree or subsequent order,[9] or which do not determine the rights of the parties in the property involved or direct the performance of any act by or against a party.[10]

Within these rules, the following orders are final and appealable: An order settling the accounts of a receiver and directing the payment of his compensation by one of the parties;[11] an order requiring a person, not a party to a suit, to pay money to a receiver of an insolvent bank, notwithstanding the fact that a part of such money was claimed by third parties;[12] an order in a suit to quiet title directing a party holding a first mortgage on the property to execute to the plaintiff, on payment of the principal and interest, an assignment of the note and mortgage;[13]

6. Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803. See supra, § 19.

7. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; City of Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 Pac. 198.

8. Hildebrand v. Superior Court, 173 Cal. 86, 159 Pac. 147; Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838.

9. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; Illinois Trust & Sav. Bank v. Pacific R. Co., 99 Cal. 407, 33 Pac. 1132; Rochat v. Gee, 91 Cal. 355, 27 Pac. 670 (order approving receiver's current account).

10. Free Gold Min. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61.

11. City of Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 Pac. 198. See Rochat v. Gee, 91 Cal. 355, 27 Pac. 670 (quaere).

12. Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803.

13. Hildebrand v. Superior Court, 173 Cal. 86, 159 Pac. 147; Grant v. Los Angeles & P. Ry. Co., 116 Cal. 71, 47 Pac. 872.

an order requiring a sheriff to sell property without an indemnity bond;[14] and an order in a divorce suit directing the payment of temporary alimony and counsel fees.[15] On the other hand, any order that a court may make upon the application of a receiver for directions in aiding or preserving the property involved in a suit, whether for the expenditure of money or for the performance of any duty, may be reviewed, upon proper exceptions thereto, after final judgment has been rendered, or, in exceptional cases, after the settlement of his final account. To permit a direct appeal from such orders would greatly hamper the court in its efforts to preserve the property, and might prejudice the rights of all the parties interested. Accordingly, a direct appeal will not lie from an order directing the action of a receiver in the disbursement of a portion of the funds in his hands,[16] or from an order which is merely a partial settlement of a receiver's account.[17] An order directing a receiver to pay counsel fees out of the funds in his hands,[18] or to apply funds in his hands toward the payment of his compensation[19] stands

14. See infra, § 33.

15. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709, quoting with approval Blake v. Blake, 80 Ill. 523. See ALIMONY, vol. 1, pp. 966, 993.

16. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838 (an order authorizing the issuance and disposal of receiver's certificates and the application of the proceeds to the construction of restraining levees); Free Gold Min. Co. v. Spiers, 136 Cal. 484, 69 Pac. 143; Free Gold Min. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61 (an order authorizing a receiver to pay the cost of installation of a cyanide plant out of funds coming into his hands as a receiver). See RECEIVERS.

17. Rochat v. Gee, 91 Cal. 355, 27 Pac. 670, followed in Illinois Trust & Sav. Bank v. Pacific R. Co., 99 Cal. 407, 33 Pac. 1132. See infra, § 36.

18. Heinze v. Butte & B. Consolidated Mining Co., 129 Fed. 337, 64 C. C. A. 15, quoted in Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838.

19. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838, overruling Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71, 47 Pac. 872; Grant v. Superior Court, 106 Cal. 324, 39 Pac. 504. See RECEIVERS.

upon the same ground. If the sums were improperly disbursed, the error may be reviewed in adjusting the receiver's final account.

§ 22. Effect of Grant of New Trial or Vacation of Judgment.—The effect of an order granting a new trial, when it becomes final, is to set aside the findings or verdict in an action, and to cause the judgment resting thereon to fall. Consequently, an appeal cannot be taken from the judgment after such order has become final, either by the expiration of the time in which to appeal,[20] or by a dismissal of a direct appeal therefrom,[1] or by an affirmance of the order.[2] While the ultimate effect of the order, if unappealed from, or if sustained upon appeal where one is taken, is to vacate the judgment and require another trial of the action, such result does not follow until the finality of the order is determined in one or the other modes suggested. Pending an appeal therefrom, it is suspended and set at large, and the rights of the parties stand unaffected thereby, excepting in so far as their prosecution may be stayed by virtue of the provisions of the statute. The judgment then remains subsisting, and, for the purpose of an appeal, stands as if no order for a new trial had ever been made.[3] That the

20. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468.

1. Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205.

2. San Jose Safe Deposit Bank of Savings v. Bank of Madera, 121 Cal. 543, 54 Pac. 85; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798; Blackburn v. Abila, 4 Cal. Unrep. 982, 39 Pac. 797; Donnelly v. Gray Bros., 3 Cal. App. 59, 84 Pac. 451.

3. Puckhaber v. Henry, 147 Cal. 424, 81 Pac. 1105 (during the time on which an appeal from an order granting a new trial may be taken, and during the pendency of such an appeal, the judgment is not absolutely vacated. Certain rights under the judgment are, of course, suspended, but it is still a potential judgment sufficient to support the appeal taken from it); Mountain Tunnel G. M. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205 (in Bank). See Kower v. Gluck, 33 Cal. 401 (limited by Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205, and held to be authority only for the proposition that where an appeal from the judgment and an order granting a new trial are heard

effect of the order is not to destroy the judgment ipso facto upon its entry is made clear by the effect of a reversal of the order on appeal. The law does not provide for the entry of a new judgment in the court below on the going down of the remittitur as would be required had the judgment wholly ceased to exist, but the judgment as originally entered in that court stands as the judgment in the action, and has effect from the date of such original entry.[4] A contrary rule would preclude the party against whom the judgment was recovered from attacking the judgment, should his order granting a new trial be reversed, as the statute provides for no extension of time to appeal from the judgment in such case. In other words, the judgment exists for the purposes of procedure where otherwise rights would be lost by mere lapse of time, without any power of the party interested to prevent it. In days of old, it would perhaps have been said to be a fiction indulged for the sake of the remedy.[5] A defendant, after having had the judgment set aside on his own motion, cannot treat it as valid for the purpose of having it reviewed upon an appeal.[6]

together, and the latter is affirmed, the appeal from the judgment becomes inconsequential and will be dismissed); Bronner v. Wetzlar, 55 Cal. 419 (this case is similar to Kower v. Gluck, 33 Cal. 401, and is undoubtedly governed by the explanation just made of the last case).

See Wittenbrock v. Bellmer, 62 Cal. 558, holding that when a new trial has been granted as to some of the parties, the judgment, so far as it affects the rights of the moving party and the adverse parties with respect to whom the new trial has been granted, comes to naught with the findings supporting it. But in so far as the judgment purports to determine the rights of the moving party and those as to whom the new trial was denied, it continues to exist and is appealable; Brooks v. San Francisco & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570, where the court in affirming an order granting a new trial dismissed an appeal from the judgment upon the ground that upon such affirmance the judgment will cease to exist.

4. Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205, per Van Fleet, J. See NEW TRIAL.

5. Smith v. Superior Court, 136 Cal. 17, 68 Pac. 100.

6. Storke v. Storke, 111 Cal. 514, 44 Pac. 173.

§ 23. Interlocutory Orders Generally.—As affecting the right to appeal therefrom, orders are divided into two classes, interlocutory orders and special orders made after final judgment.[7] Interlocutory orders are not appealable unless specifically enumerated in the provision of the code authorizing the taking of appeals; in other words, in subdivision 2 of section 963 of the Code of Civil Procedure.[8] It is immaterial in this connection whether the action is in equity or not, for interlocutory orders in equity cases as in actions at law may be the subject of direct appeal only when the statute so provides.[9] Such, also, was the rule under the constitution of 1849 and the Practice Act.[10]

7. See infra, § 24.

8. Krotzer v. Clark, 178 Cal. 736, 174 Pac. 657 (an interlocutory judgment in an action to annul a contract for the sale of realty and quiet title which requires the tender of a deed by the plaintiff and provides that his title shall be quieted if the defendant fails to pay the balance of the purchase price); Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161 (an order in a proceeding to wind up a corporation declaring the right of a stockholder to distribution and directing the giving of notice to creditors and filing of an inventory of assets); Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014 (interlocutory decree for an accounting); Nolan v. Smith, 137 Cal. 360, 70 Pac. 166; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115 (an interlocutory decree in action to compel conveyance of real property is not appealable); Illinois Trust & Savings Bank v. Pacific R. Co., 99 Cal. 407, 33 Pac. 1132; Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per McKee, J., dissenting); Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418 (order appointing receiver made before amendment of code authorizing appeal); Broadribb v. Tibbetts, 62 Cal. 614 (order denying a motion for judgment by default against a guardian and that the guardian be removed as prayed in the cross-complaint); In re French Bank Case, 53 Cal. 495 (order appointing receiver). See, also, United States v. Fossatt, 62 U. S. 445, 16 L. Ed. 186, see, also, Rose's U. S. Notes, holding that when a case is sent to the court below by mandate, no appeal will lie from any order or decision of the court until it has passed its final decree in the case.

9. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per McKee, J., dissenting).

10. Myers v. Mott, 29 Cal. 359,

With reference to the particular orders which are the subject of a direct appeal, the code authorizes an appeal from the following: From an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right,[11] or granting or dissolving an injunction or refusing to grant or dissolve an injunction,[12] or appointing a receiver,[13] or dissolving or refusing to dissolve an attachment,[14] or changing or refusing to change a place of trial,[15] from any special order made after final judgment,[16] from any interlocutory judgment, order or decree made or entered in actions to redeem real or personal property from a mortgage thereof or lien thereon, determining such right to redeem and directing an accounting,[17] and from any such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made,[18] and from interlocutory decrees of divorce.[19] Any order not within the terms of this provision is reviewable upon a direct appeal therefrom if it is embraced by the term "final judgment";[20] or, if not such final judgment, upon an appeal from such final judgment as may thereafter be entered in the action.[1]

§ 24. Special Orders Made After Final Judgment.—The code authorizes the taking of an appeal "from any special order made after final judgment."[2] The final

89 Am. Dec. 49; Allender v. Fritts, 24 Cal. 447; Gimmy v. Doane, 22 Cal. 635; Baker v. Baker, 10 Cal. 527; De Barry v. Lambert, 10 Cal. 503; Juan v. Ingoldsby, 6 Cal. 439; Gianelli v. Briscoe, 40 Cal. App. 532, 181 Pac. 105.

11. See infra, § 34.

12. See infra, § 37, and see supra, § 15.

13. See infra, § 36.

14. See infra, § 36.

15. See infra, § 42.

16. See infra, § 24.

17. Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014. See MORTGAGES.

18. See infra, § 38.

19. See DIVORCE.

20. See supra, §§ 18–21.

1. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; Illinois Trust & Sav. Bank v. Pacific R. Co., 99 Cal. 407, 33 Pac. 1132. See infra, § 67, as to matters reviewable on appeal from final judgment.

2. Code Civ. Proc., § 963, subd. 2; Cross v. Mayo, 167 Cal. 594, 140

judgment referred to is the final judgment mentioned in subdivision 1, of section 963, viz.: "A final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court."[3] The term "final judgment" does not embrace an order for judgment,[4] or judgments or orders in probate proceedings;[5] and orders made thereafter are not appealable as special orders made after final judgment. Since the reversal of a judgment has the effect of vacating it, it follows that orders made after the reversal and remand of the cause for new trial are not appealable as orders made after final judgment.[6] Where findings of fact are not waived, it has been held that there

Pac. 283; City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477 (holding a final order of condemnation made after affirmance of a judgment awarding damages is appealable as a special order made after final judgment); Harron v. Harron, 123 Cal. 508, 56 Pac. 334; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48; Etchebarne v. Roeding, 89 Cal. 517, 26 Pac. 1079 (holding an order setting aside a referee's report not to be an order after judgment); California Southern R. R. Co. v. Southern Pacific R. R. Co., 67 Cal. 59, 7 Pac. 123 (holding final order of condemnation to be appealable); Newman v. Superior Court, 62 Cal. 545; Calderwood v. Peyser, 42 Cal. 110; Wells, Fargo & Co. v. Anthony, 35 Cal. 696 (an order discharging a defendant from imprisonment under the act of 1850 for the relief of persons imprisoned on civil process is a special order after final judgment); Williams v. Reed (Cal. App.), 185 Pac. 515 (orders after an "interlocutory" judgment in an action for an accounting after the dissolution of a partnership); Stensland v. Superior Court, 39 Cal. App. 172, 178 Pac. 549; Hughes v. Chung Sun Tung Co., 28 Cal. App. 371, 154 Pac. 299, 301 (holding an order vacating a nonsuit to be an order after judgment); Magee v. Superior Court, 10 Cal. App. 154, 101 Pac. 532.

3. In re Calahan's Estate, 60 Cal. 232. See supra, §§ 18–21.

4. MacNevin v. MacNevin, 63 Cal. 186, explained in In re Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 19 Pac. 431 (where the court says: "All the court can be considered as having decided in the case was, that, as an appeal from a judgment could not be taken until after its entry, therefore, for the purpose of an appeal, no order could be considered as an order made after final judgment which had not been made after entry of judgment"). See supra, § 15.

5. See infra, § 43.

6. Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065; Matter of Kling (Cal. App.), 192 Pac. 453. See infra, § 29.

can be no entry of judgment until they are made and filed, and therefore an order after issue joined denying relief to a party is not a final judgment, and orders thereafter made are not appealable as special orders after final judgment.[7]

An "order" within the meaning of this provision has been defined to be the judgment or conclusion of the court, upon any motion or proceeding.[8] And it is clear that the term "order" includes cases where the court denies as well as where it grants affirmative relief.[9] In several early cases it was held necessary that the order, to be appealable by virtue of this code section, depend in some way upon the judgment itself or follow it in logical sequence or in the same line of proceedings. These cases, however, have been overruled, because adding limitations not contemplated by the code.[10] The legislature, says an early case, seems to have been of the opinion that any order was sufficiently within the line of procedure when it came in the order of succession designated in the statute; viz., after final judgment.[11] The necessity for this provision allowing appeals from special orders after judgment is apparent when it is considered that an appeal from the judgment would only bring up the record of the proceedings resulting in the judgment, and that such ap-

7. Cuneo v. Cuneo, 40 Cal. App. 564, 181 Pac. 229. See, also, Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 Pac. 45, holding an order after judgment denying a motion to strike out a cost bill is not appealable where no findings were made or waived.

8. See supra, § 15, for code definition of order.

9. Gilman v. Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

10. Clark v. Crane, 57 Cal. 629; McDonald v. McConkey, 57 Cal. 325 (holding an order dismissing a motion for new trial appealable as an order after judgment); Calderwood v. Peyser, 42 Cal. 110 (overruling Quivey v. Gambert, 32 Cal. 304, and cases upon which it is based, including Pendegast v. Knox, 32 Cal. 73; and Ketchum v. Crippen, 31 Cal. 365); Morris v. De Celis, 41 Cal. 331; Descalso v. Duane, 3 Cal. Unrep. 893, 33 Pac. 328; Magee v. Superior Court, 10 Cal. App. 154, 101 Pac. 532.

11. Clark v. Crane, 57 Cal. 629, per Thornton, J.

peal may have been taken and even disposed of before the making of the order complained of. Furthermore, any such test would be unsatisfactory and would in many instances be productive of utmost confusion and most profitless preliminary discussion.[12]

It does not follow, however, that any order subsequent to the final judgment in point of time is appealable. It is necessary that the order affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution.[13] Because they did not bear such relation to the judgment it was held that an appeal would not lie from an order denying a motion to dismiss a motion for new trial,[14] an order relieving a party moving for a new trial from his failure to present his bill of exceptions for settlement in time,[15] or a ruling in a supplementary proceeding upon the admission of evidence.[16] Such orders do not dispose of the motion or proceeding itself, and until some order is made which in effect grants or denies the motion for a new trial, neither party is aggrieved, and there is nothing to appeal from.[17]

The order must, of course, be one made in the cause in which the judgment was rendered. If made in an independent proceeding, it must be appealed, if at all, as a

12. Calderwood v. Peyser, 42 Cal. 110.

13. Watson v. Pryor (Cal. App.), 193 Pac. 797; Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497; Griess v. State Investment & Ins. Co., 93 Cal. 411, 28 Pac. 1041; Magee v. Superior Court, 10 Cal. App. 154, 101 Pac. 532 ("The important fact remains that the order to which objection is here made concerned and affected the judgment." It seems to be now the settled rule that "any special order made after final judgment affecting such judgment, although not dependent upon it," is an appealable order).

14. Greiss v. State Investment & Ins. Co., 93 Cal. 411, 28 Pac. 1041.

15. Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497.

16. Watson v. Pryor (Cal. App.), 193 Pac. 797 (the rulings neither add to nor subtract from the relief granted in an action nor adjudicate any rights or establish any liabilities).

17. Mercantile Trust Co. v. Sunset Road Oil Co., 173 Cal. 487, 160 Pac. 545.

final judgment in a special proceeding.[18] But an order is none the less a special order after final judgment because it is made by a judge other than the one who tried the case. The acts of such judge are only ancillary to the jurisdiction of the court which rendered the judgment.[19] Orders made in the justice's or police or other inferior courts are not included in this code section, as the next following section expressly provides that section 963 shall not apply to cases appealed from such courts.[20]

§ 25. Appeal from Part of Judgment or Order.—Although it is not expressly provided that a party may appeal from a part of a judgment, the right to do so is recognized by section 940 of the Code of Civil Procedure, which provides in substance that an appeal is taken by filing and serving a notice of appeal stating the appeal from the judgment or order or some specific part thereof.[1] In this connection a litigant has the same right to appeal from a portion of an order that he has to appeal from a portion of a judgment.[2] When, however, the trial court strikes out a portion of a complaint seeking certain relief,

18. Brown v. Starr, 75 Cal. 163, 16 Pac. 760. See infra, § 33, as to appeals from orders in proceeding for appraisal of homestead, in illustration of this rule.

19. Wells, Fargo & Co. v. Anthony, 35 Cal. 696.

20. Code Civ. Proc., § 964; Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457.

1. G. Ganehl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 Pac. 1025; Whalen v. Smith, 163 Cal. 360, Ann. Cas. 1913E, 1319, 125 Pac. 904; Luck v. Luck, 83 Cal. 574, 23 Pac. 1035; San Diego Land & T. Co. v. Neale, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187, explaining People v. Center, 61 Cal. 191. (The statement in that case that no separate appeal lies from parts of two judgments means, we suppose, that there cannot be one appeal from parts of two judgments. Certainly there must be an appeal from each judgment, or a specific part of it); Early v. Mannix, 15 Cal. 149.

2. Donnelly v. Gray Brothers, 3 Cal. App. 59, 84 Pac. 451; Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066. See Stateler v. Superior Court, 107 Cal. 536, 40 Pac. 949, holding the appeal taken embraces the whole order.

and thereafter tries the cause on the remaining averments and does not, in terms in its judgment, refuse to grant such relief, the plaintiff cannot take an appeal from a refusal to grant such relief as from a part of the judgment.[3] When an appeal from a part of a judgment or order is properly taken, obviously the appellate court will review only that part of the judgment or order from which the appeal is taken, provided that portion is severable from the remainder of the judgment or order.

II. PARTICULAR JUDGMENTS AND ORDERS APPEALABLE.

§ 26. Parties and Pleadings.—An appeal will not lie from an order substituting a party plaintiff,[4] or adding a new party defendant,[5] as they are not final judgments and no appeal is given therefrom. But an order denying an application to intervene in an action ends the litigation as to the intervener and may be appealed by him immediately free and unhampered by the subsequent proceedings in the action or final judgment rendered against the defendant.[6] The applicant is not required to procure the entry of a more formal judgment, as the most verbose statement could not state the determination more ac-

3. Bank of Visalia v. Curtis, 131 Cal. 178, 63 Pac. 344 (the plaintiff can have the action of the court in striking out the portion of his complaint through a motion for a new trial, but he is not entitled to appeal from a judgment rendered upon findings covering all the issues in the action upon the ground that the court refused to enter judgment upon issues not presented or tried).

4. Grant v. Los Angeles & P. Ry. Co., 116 Cal. 71, 47 Pac. 872; Welch v. Allen, 54 Cal. 211.

5. Beck v. San Francisco, 4 Cal. 375. See PARTIES.

6. Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616 (overruling Wenborn v. Boston, 23 Cal. 321); Thorpe v. North Moneta Garden Lands Water Co., 12 Cal. App. Dec. 186, 106 Pac. 1107. See Coburn v. Smart, 53 Cal. 742, where the applicant appealed both from the final judgment in the action and from the order denying his motion. The propriety of the latter appeal was not directly passed on. Grand Grove of U. A. O. of Druids v. Garibaldi Grove No. 71, etc., 105 Cal. 219, 38 Pac. 947, refusing to pass on the propriety of the court's order as the intervener had not appealed.

curately or effectually.[7] So, also, when a demurrer to an intervention already allowed is sustained and judgment is rendered against the intervener, he may appeal therefrom without waiting final judgment in the action, as the judgment on demurrer is a final determination as to him.[8]

It is well established that no appeal will lie from an order sustaining a demurrer to a portion or the whole of a pleading, or dismissing it in whole or in part.[9] Neither will an appeal lie from an order overruling a demurrer.[10]

7. Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616.

8. People v. Pfeiffer, 59 Cal. 89; Stich v. Dickinson, 38 Cal. 608; Dabney Oil Co. v. Providence Oil Co., 29 Cal. App. 251, 155 Pac. 114 (but holding the order in the case at bar to be unappealable because it was a dismissal as to part of the parties only); Hadsall v. Case, 15 Cal. App. 541, 115 Pac. 330.

9. Pacific Seaside Home for Children v. Newbert Protection Dist. (Cal. App.), 193 Pac. 169; Cornic v. Stewart, 179 Cal. 242, 176 Pac. 164; Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680; Rickert v. Zoeger, 169 Cal. 399, 146 Pac. 894; Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; De La Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717; Fortain v. Smith, 114 Cal. 494, 46 Pac. 381; Ashley v. Olmstead, 54 Cal. 616; Agard v. Valencia, 39 Cal. 292; Hibberd v. Smith, 39 Cal. 145 (demurrer to answer); Daniels v. Landsdale, 38 Cal. 567 (demurrer to answer); Sutter v. City and County of San Francisco, 36 Cal. 112 (demurrer to amended complaint); Quivey v. Gambert, 32 Cal. 304 (per Sawyer, J., dissenting); Moulton v. Ellmaker, 30 Cal. 527; Moraga v. Emeric, 4 Cal. 308; Ham v. County of Los Angeles (Cal. App.), 189 Pac. 462; City of Napa v. Maxwell, 36 Cal. App. 103, 171 Pac. 837, approving former opinion in 25 Cal. App. Dec. 824; Brunson v. City of Santa Monica, 25 Cal. App. 383, 143 Pac. 792 (order sustaining demurrer without leave to amend); Baldwin v. Walls, 23 Cal. App. 349, 137 Pac. 1066; Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772 (demurrer to petition for writ of mandamus); Hadsall v. Case, 15 Cal. App. 541, 115 Pac. 330 (demurrer to petition in intervention); Kinard v. Jordan, 10 Cal. App. 219, 101 Pac. 696; Litch v. Kerns, 8 Cal. App. 747, 97 Pac. 897.

10. Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680; Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; Foster v. Bowles, 138 Cal. 449, 71 Pac. 495; Heilbron v. Centerville & K. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Hibberd v. Smith, 39 Cal. 145; Gates v. Walker, 35 Cal. 289; Moulton v. Ellmaker, 30 Cal. 527; Moraga v. Emeric, 4 Cal. 308; Dodge v. Northern Electric Ry. Co., 22 Cal. App. 239, 133 Pac. 1161; Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772; Litch v. Kerns, 8 Cal. App. 747, 97 Pac. 897. But

Such orders are interlocutory in character and are not mentioned among those in the statute which are made the subject of appeal. The rulings on demurrer are, however, reviewable on appeal from the judgment itself,[11] and when a party elects to stand on his pleading and a judgment sustaining the demurrer is rendered, the party may appeal from the judgment.[12] Such a judgment is a final judgment whether it declares that the plaintiff take nothing, or that the action shall abate, or that the action be dismissed.[13]

It is also well settled that no appeal will lie from the following interlocutory orders: An order directing that a complaint be made more definite and certain,[14] an order denying an application to file an amended pleading,[15] or a supplemental pleading,[16] an intermediate judgment denying relief upon a cross-complaint,[17] an order allowing judgment on the pleadings,[18] an order striking a demurrer from the files,[19] and an order made on a motion to strike out a pleading or portions thereof.[20]

see Burgoyne v. Perry, 3 Cal. 50, under the act of 1851 authorizing an appeal from every order affecting a substantial right.

11. See infra, § 67, as to review on appeal from the judgment.

12. Baxter v. Baege, 173 Cal. 589, 160 Pac. 1072; Jones v. Chalfant, 128 Cal. 334, 60 Pac. 852; City of Napa v. Maxwell, 36 Cal. App. 103, 171 Pac. 837, 25 Cal. App. Dec. 824 (where the demurrer is sustained without leave to amend, the proper course is to have a judgment entered dismissing the action and then to appeal from this final judgment); Hadsall v. Case, 15 Cal. App. 541, 115 Pac. 330; Litch v. Kerns, 8 Cal. App. 747, 97 Pac. 897.

13. Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868.

14. McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761.

15. Cornic v. Stewart, 179 Cal. 242, 176 Pac. 164; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

16. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

17. Stockton Combined H. & Agr. Wks. v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

18. Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

19. Cuddahy v. Gragg (Cal. App.), 189 Pac. 721.

20. California Portland Cement Co. v. Boone, 181 Cal. 35, 183 Pac. 447 (an order denying a motion to strike out); Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730 (order striking out an amended complaint); Swain v. Burnette, 76

§ 27. Dismissal and Nonsuit.—An order refusing to dismiss an action or overruling a motion for a nonsuit is clearly interlocutory, and, as it is not enumerated in the code, unappealable.[1] The action of the court in such a matter may be reviewed on an appeal from the judgment, if properly presented by the record.[1a] An order dismissing an action without regard to the relative rights of the parties as shown by the pleadings is not a final judgment in a strict sense, but it is treated as such for all the purposes of taking an appeal because it finally disposes of the particular action as effectually as would any formal judgment based on ruling on demurrer or on findings or verdict on the facts.[2] The code provides that an action may be dismissed or a judgment of nonsuit entered when either party fails to appear on the trial and the other party appears and asks for a dismissal, when upon the trial and before the submission of a cause the plaintiff abandons it,[3] or when upon the trial the plaintiff fails to prove a sufficient case for the jury, and the defendant

Cal. 299, 18 Pac. 394 (order striking out); Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77 (order striking out an answer); Sutter v. City & County of San Francisco, 36 Cal. 112 (an order striking out an immaterial portion of a pleading is not appealable); Myers v. Holton, 9 Cal. App. 114, 98 Pac. 197 (order refusing to strike amended complaint from files).

1. Leavens v. Pinkham etc., 164 Cal. 242, 128 Pac. 399; Fraser v. Sheldon, 164 Cal. 165, 128 Pac. 33; Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326; Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132; Christie v. Christie, 53 Cal. 26; Forrester v. Lawler, 14 Cal. App. 170, 111 Pac. 284. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

1a. Leavens v. Pinkham, etc., 164 Cal. 242, 128 Pac. 399.

2. Dempsey v. Underhill, 156 Cal. 718, 106 Cal. 73 (an order dismissing an action because not brought to trial in five years after issue joined); Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; Estate of Gregory, 122 Cal. 483, 55 Pac. 144; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57 (an order dismissing an action for want of prosecution); Tripp v. Santa Rosa Street R. R. Co., 69 Cal. 631, 11 Pac. 219; Belt v. Davis, 1 Cal. 134. But see Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103, holding an order dismissing an action is unappealable.

3. Code Civ. Proc., § 581.

moves for a nonsuit.[4] These dismissals must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered.[5] From the language of this code section it is seen that in terms the law recognizes a judgment of nonsuit as distinguished from a judgment of dismissal, and further declares that the order of nonsuit entered upon the minutes of the court constitutes this judgment of nonsuit. It is thus clear that in the present state of the law, a judgment of nonsuit, as distinguished from a judgment of dismissal usually following an order of nonsuit, is appealable.[6] So, also, with reference to other orders of dismissal, though the code does not carry this language into the other provisions relating to dismissals, the effect of the dismissal can be none other than that specified in the section just referred to, and the order when entered in the minute-book is in nature a final judgment, from which an appeal may be taken.[7]

Where in an action brought to have a deed declared to be a mortgage, the court decrees that the plaintiff be barred of his rights in the premises if he does not within a limited time pay the balance due on the mortgage, a subsequent order dismissing plaintiff's action and barring his equity of redemption for noncompliance with the

4. Code Civ. Proc., § 581; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 Pac. 322; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

5. Code Civ. Proc., § 581.

6. Brown v. Sterling Furniture Co., 175 Cal. 563, 166 Pac. 322, per Henshaw, J.; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882. See Kimple v. Conway, 69 Cal. 71, 10 Pac. 189, holding an order of nonsuit is not appealable; Stebbins v. Larson, 4 Cal. App. 482, 88 Pac. 505, holding an order granting a nonsuit and ordering a judgment of nonsuit is not appealable.

7. Boyer v. City of Long Beach (Cal. App.), 191 Pac. 35 (dismissal under Code Civ. Proc., § 581a); Matthai v. Kennedy, 148 Cal. 699, 84 Pac. 37; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352 (judgment dismissing action because the issuance or service of summons was not made in time); Marks v. Keenan, 140 Cal. 33, 73 Pac. 751; Tripp v. Santa Rosa Street R. R. Co., 69 Cal. 631, 11 Pac. 219.

terms of the judgment is a final and appealable judgment.[8]

§ 28. Trials and References.—Because they are interlocutory and are not enumerated in the code as appealable orders, no appeal will lie from the following orders: An order denying a motion to introduce certain evidence, or an order refusing to vacate such an order,[9] a ruling refusing to strike out testimony,[10] an order overruing a motion to reopen a case,[11] an order amending the findings,[12] and an order of the court denying a motion to amend its minutes.[13] An order staying all proceedings in an action until further order of the court is not an order granting an injunction against the parties within the meaning of the code and is not appealable.[14] No appeal lies from an order appointing a referee,[15] or from an order vacating an order of reference and the proceedings subsequent thereto,[16] or from an order overruling exceptions to a referee's report.[17] The confirmation of a referee's report and an order that judgment be entered is not a final judgment, when the court has not pronounced judgment on the facts found or determined the particular relief to which the plaintiff is entitled.[18] An order setting aside the report of a referee appointed to take an account or to ascertain a fact is interlocutory and not the subject of

8. Byrne v. Hudson, 127 Cal. 254, 59 Pac. 597.

9. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103. See infra, § 31, as to appeals from orders refusing to vacate orders.

10. Leavens v. Pinkham etc., 164 Cal. 242, 128 Pac. 399.

11. Phenegar v. Paslini, 27 Cal. App. 381, 149 Pac. 1008.

12. Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975.

13. Griess v. State Inv. & Ins. Co., 93 Cal. 411, 28 Pac. 1041.

14. Avery v. Superior Court, 57 Cal. 247; Rhodes v. Craig, 21 Cal. 419 (the remedy of the party is by application for a mandamus to compel the court to proceed).

15. Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381; Gates v. Walker, 35 Cal. 289. See REFERENCES.

16. Hastings v. Cunningham, 35 Cal. 549.

17. Peck v. Courtis, 31 Cal. 207.

18. Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393.

direct appeal.[19] But the decision of a referee on the whole issue stands as a decision of the court, and the entry of judgment follows as a matter of course. A motion then to set aside the report and for a new trial is after judgment, and an appeal lies from the order on the motion.[20] Actions for divorce are an exception to the latter rule. The referee is not authorized to make findings of fact, and an order purporting to set aside his findings and sending the case back for further testimony is interlocutory only.[1]

§ 29. **Judgments, Costs and Attorneys' Fees.**—An order denying a motion to correct a judgment or the file-mark is appealable as a special order after final judgment.[2] If a motion to amend a judgment is granted, an appeal may be taken from the judgment as modified. In such case it is the judgment as modified which is the final judgment in the case; the original judgment, being superseded, is without force.[3] Whether an appeal will lie from the order allowing the amendment is not clear. It has been held that an appeal from such order is premature, as the only judgment appealable is the modified judgment as entered.[4] There are, however, expressions in some of the cases which seem to indicate that such an appeal will lie.[5] When a judgment or decree of a su-

19. Etchebarne v. Roeding, 89 Cal. 517, 26 Pac. 1079; Johnston v. Dopkins, 6 Cal. 83.

20. Baker v. Baker, 10 Cal. 527; Johnston v. Dopkins, 6 Cal. 83.

1. Baker v. Baker, 10 Cal. 527. See DIVORCE AND SEPARATION.

2. Tuffree v. Stearns Ranchos Co., 6 Cal. Unrep. 134, 54 Pac. 826, explaining Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093.

3. Estate of Potter, 141 Cal. 424, 75 Pac. 850; Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360; San Francisco Savings Union v. Myers, 72 Cal. 161, 13 Pac. 403; Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975.

4. Bixby v. Bent, 59 Cal. 522 (holding an appeal will not lie from an order modifying an interlocutory decree in partition. The appeal must be taken from the decree as modified).

5. Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360 (holding an order made after judgment reducing it by striking out the costs therefrom is appealable as a special order made after final judgment, as the order applies to the judgment and not the cost bill, although its

perior court is not consistent with or supported by a special verdict, or when conclusions of law are not consistent with or supported by the findings of fact, the party aggrieved may move to vacate the judgment and to have another judgment entered.[6] Section 663a of the Code of Civil Procedure specifically provides that an order of court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment.[7] This section makes no provision for an appeal from an order denying such motion. However, such order is appealable as a special order made after judgment under the provisions of section 963 of the Code of Civil Procedure.[8] A judgment rendered in a suit brought

basis is the cost bill. The order is reviewable either on a direct appeal therefrom or on an appeal from the judgment as modified); Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956 (holding an order modifying a decree of divorce to be appealable); Jones v. Frost, 28 Cal. 215 (holding to be appealable an order adding to the judgment a sum for costs, after the expiration of the time for filing a memorandum and perfection of an appeal from the judgment); Bryan v. Berry, 8 Cal. 130 (an order amending a judgment made pending an appeal therefrom is appealable).

6. Code Civ. Proc., § 663. And see JUDGMENT.

7. Spotton v. Superior Court, 177 Cal. 719, 171 Pac. 801; Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073; Condon v. Donohue, 160 Cal. 749, 118 Pac. 113; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Modoc Co-operative Assn. v. Porter, 11 Cal. App. 270, 104 Pac. 710.

Prior to 1915 the code authorized a review of such order "in the same manner as orders made on motions for a new trial," Bond v. United Railroads of San Francisco, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; and it was held that such order was not directly appealable. Birch v. Cooper, 136 Cal. 636, 69 Pac. 420.

8. Condon v. Donohue, 160 Cal. 749, 118 Pac. 113; Bond v. United Railroads of San Francisco, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; Rahmel v. Lehndorff, 142 Cal. 681, 100 Am. St. Rep. 154, 65 L. R. A. 88, 76 Pac. 659; Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; Taylor v. Darling, 19 Cal. App. 232, 125 Pac. 249. Compare Modoc Co-operative Assn. v. Porter, 11 Cal. App. 270, 104 Pac. 710, holding that the code failed to make such provision for the very obvious reason that on an appeal from the judgment the same proposition may be reviewed, and a reversal could be ordered and the court below directed to enter the judgment which the findings alone justify.

to vacate a judgment on the ground of fraud and collusion is a final judgment and appealable as such.[9] An order on a motion to retax costs made before entry of judgment is interlocutory and not appealable.[10] But when such an order is made after judgment, it is appealable as a special order after final judgment, as the motion to tax a cost bill is a special motion that is not a proceeding as of course in the cause.[11]

An order of a lower court allowing a respondent attorney's fees in the supreme court stands upon the same plane as the last order and is appealable.[12] So, also, an order in a divorce action directing the payment of sums of money for counsel fees and costs to enable the wife to contest a motion for new trial is appealable.[13] Since, however, a reversal of a judgment and remand of the cause for a new trial places the parties in the same position as if a new trial had never been had, it follows that an order on a motion to retax costs is not appealable after such reversal.[14]

§ 30. Order on Motion to Vacate Judgment or Order.—An order setting aside a final judgment is appealable as a special order made after final judgment.[15] The effect of

9. Belt v. Davis, 1 Cal. 134.

10. Levy v. Getleson, 27 Cal. 685. See COSTS.

11. Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360; Crane v. Forth, 95 Cal. 88, 30 Pac. 193; Yorba v. Dobner, 90 Cal. 337, 27 Pac. 185 (holding an order striking out a cost bill made after judgment is appealable); Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810 (overruling Lasky v. Davis, 33 Cal. 677); Dooly v. Norton, 41 Cal. 439; Engel v. Ehret, 21 Cal. App. 112, 130 Pac. 1197 (explaining Quitzow v. Perren, 120 Cal. 255, 52 Pac. 632); Linforth v. San Francisco Gas & Elec. Co., 9 Cal. App. 434, 99 Pac. 716.

12. Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 Pac. 622.

13. Harron v. Harron, 123 Cal. 508, 56 Pac. 334. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 993.

14. Matter of Kling (Cal. App.), 192 Pac. 453.

15. Butler v. Soule, 124 Cal. 69, 56 Pac. 601; Storke v. Storke, 111 Cal. 514, 44 Pac. 173; Kaufman v. Superior Court, 108 Cal. 446, 41 Pac. 476; James v. Center, 53 Cal. 31 (an order vacating a judgment of dismissal); Livermore v. Camp-

the order is to destroy the judgment, and the action of the court can only be reviewed upon an appeal from the order.[16] And as it has repeatedly been held that an appeal lies from a void judgment,[17] it follows that an order setting aside a judgment in form, on the ground that it is in fact invalid, is also appealable.[18]

Order refusing to vacate judgment or order.—When a judgment or order is not the subject of appeal, it cannot be made reviewable by the device of moving to set it aside and appealing from the order denying the motion.[19] This is in accord with the rule which forbids a party to do indirectly what is forbidden to be done directly.[20] Even where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of, under such circumstances that the motion merely calls upon the court to repeat or overrule the former ruling on the same facts.[1] If the

bell, 52 Cal. 75; McCourtney v. Fortune, 42 Cal. 387. See Dimick v. Deringer, 32 Cal. 488, decided before the amendment of section 581 of the Code of Civil Procedure in 1897, and holding that where in an action against several persons the plaintiff dismisses as to one and the latter procures a vacation of the order, the order of vacation is not an appealable order, as it is not an order subsequent to judgment, as there was no judgment either for or against such defendant, and it does not follow any judgment that may be rendered against the other defendants.

16. Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758.

17. See infra, § 40.

18. Livermore v. Campbell, 52 Cal. 75.

19. In re Spafford's Estate, 175 Cal. 52, 165 Pac. 1 (order refusing to vacate order settling administrator's accounts); Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838; Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171 (holding a request for dismissal by the plaintiff not being an order and appealable, an order refusing to set it aside is not appealable); Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Estate of Keane, 56 Cal. 407. See infra, § 31, as to the rule and limitations and exceptions thereto.

20. Estate of Keane, 56 Cal. 407.

1. Bell v. Solomons, 162 Cal. 105, 121 Pac. 377; Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838 (order refusing to vacate appointment of receiver); Kent v. Williams, 146 Cal. 3, 79

grounds upon which the party sought to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the

Pac. 527; Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; In re Cahill's Estate, 142 Cal. 628, 76 Pac. 383 (order refusing to vacate order setting apart homestead); Grant v. McArthur, 137 Cal. 270, 70 Pac. 88 (semble); Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758; Doyle v. Republic Life Ins. Co., 125 Cal. 15, 57 Pac. 667; Estate of Gregory, 122 Cal. 483, 55 Pac. 144 (an order refusing to vacate a judgment of dismissal for want of findings demanded by appellant); De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Deering & Co. v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801; Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770 (an order refusing to vacate an order striking out a statement on motion for new trial); Sutton v. Symons, 100 Cal. 576, 35 Pac. 158; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Lee Chuck v. Quon Wo Chong & Co., 91 Cal. 593, 28 Pac. 45; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57 (an order refusing to vacate a judgment of dismissal for want of prosecution); Davis v. Donner, 82 Cal. 35, 22 Pac. 879 (an order refusing to set aside an order granting a writ of assistance); Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396 (an order refusing to vacate an order refusing a new trial); Eureka & T. R. R. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360; Tripp v. Santa Rosa Street R. R. Co., 69 Cal. 631, 11 Pac. 219; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; California Southern R. R. Co. v. Southern Pac. R. R. Co., 65 Cal. 295, 4 Pac. 13; Holmes v. McCleary, 63 Cal. 497; Thompson v. Lynch, 43 Cal. 482 (order refusing to vacate an order striking from the files a notice of intention to move for a new trial); Gates v. Walker, 35 Cal. 289; Stearns v. Marvin, 3 Cal. 376; Henly v. Hastings, 3 Cal. 341; Tuffree v. Stearns Ranchos Co., 6 Cal. Unrep. 134, 54 Pac. 826; Gregory v. Gregory, 3 Cal. Unrep. 836, 32 Pac. 531; Altpeter v. Postal Telegraph-Cable Co., 25 Cal. App. 255, 143 Pac. 93; Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538; Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060 (an order refusing to vacate an appealable order is not an appealable order); Continental Bldg. & Loan Assn. v. Woolf, 12 Cal. App. 725, 108 Pac. 729; Taylor v. Marshall, 12 Cal. App. 549, 107 Pac. 1012; Ots v. Superior Court, 10 Cal. App. 168, 101 Pac. 431. See Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093 (holding an order refusing to modify a judgment to be not appealable. Disapproved in Tuffree v. Stearns Ranchos Co., 6 Cal. Unrep. 134, 54 Pac. 826, holding the rule to be better stated in the De La Montanya case, supra); People v. Greene, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197 (holding that on appeal from an order denying a motion to set aside a judgment, the court may review

motion.[2] The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside.[3] The reason for denying an appeal in the latter case is not because the order on the motion to vacate is not within the terms of section 963 of the code allowing appeals, for it may be,[4] and indeed, an order refusing to vacate a final judgment is in its very nature a special order made after judgment,[5] but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute.[6] A further reason is that the order on the motion is merely negative action of the court declining to disturb its first decision. The first decision being reviewable, the refusal to alter it any number of times will not make it less so.[7]

errors which might be the subject of review on appeal from the judgment). See, also, Morris v. De Celis, 41 Cal. 331, entertaining an appeal from an order refusing to vacate an order granting a new trial.

2. Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758; Payne v. Pullan (Cal. App.), 187 Pac. 127.

3. Estate of Baker, 170 Cal. 578, 150 Pac. 989; Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060.

4. De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

5. County of Sacramento v. Central Pacific R. R. Co., 61 Cal. 250 (holding that where, in an action for state and county taxes, the district attorney accepts an offer of judgment for less than the amount sued for, an order denying a motion of the attorney general to vacate the judgment is appealable); Hibernia Savings & Loan Soc. v. Cochran, 6 Cal. Unrep. 821, 66 Pac. 732 (but refusing to dismiss the appeal, as the motion involved an examination of the record).

6. Estate of Baker, 170 Cal. 578, 150 Pac. 989 (the manifest result of the sanction of such a general practice would be to declare that every unsuccessful litigant has two appeals, the time of one being fixed by law, the time of the other being fixed by his own convenience, after denial of his motion to vacate the judgment complained of); De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Tuffree v. Stearns Ranchos Co., 6 Cal. Unrep. 134, 54 Pac. 826.

7. Davis v. Donner, 82 Cal. 35, 22 Pac. 879; California Southern R. R. Co. v. Southern Pacific R. R. Co.,

This rule applies not only to judgments and orders made in actions formerly denominated actions at law, but it applies as well to orders in probate proceedings,[8] and to orders in actions formerly denominated suits in equity. The fact that the constitution grants the supreme court appellate jurisdiction only "in such probate matters as may be provided by law" and in "all cases in equity" does not affect this question, for it is well settled that interlocutory orders in equity cases, like all orders in probate, may be made the subject of direct appeal only when such appeal is authorized by statute.[9]

§ 31. Limitation of Rule as to Order Refusing to Vacate.—The rule which forbids an appeal from an order refusing to vacate an appealable judgment or order is not without its limitations. A reason for refusing to entertain the appeal is that the party aggrieved had already had an opportunity to appeal from the same ruling; and he cannot extend his time for taking an appeal by making the court repeat its ruling. This reason cannot apply where the circumstances are such that no appeal could have been taken from the first order,[10] or when such an appeal from the first order would be vain for lack of a record showing the rights of the aggrieved party.[11] For example, a person not a party to

65 Cal. 295, 4 Pac. 13; Henly v. Hastings, 3 Cal. 341.

8. In re Get Young, 90 Cal. 77, 27 Pac. 158 (appeal from an order refusing to revoke an order appointing a guardian).

9. Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838.

10. Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838; Tattenham v. Superior Court, 155 Cal. 205, 100 Pac. 248; Elliott v. Superior Court, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109; People v. Grant, 45 Cal. 97.

11. Kent v. Williams, 146 Cal. 3, 79 Pac. 527; De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Tuffree v. Stearns Ranchos Co., 6 Cal. Unrep. 134, 54 Pac. 826, where a motion was made after judgment to correct the file-mark thereon, and to strike out the names of certain parties who died prior to and were not represented on appeal.

a proceeding resulting in a judgment or order against him is not authorized to appeal from the judgment or order rendered therein, but he may make himself a party by moving to set aside such judgment or order, and if his motion is denied, he may, on appeal from that order, have the proceeding of which he complains reviewed not only for excess of jurisdiction but also for error.[12] Indeed, this is a practice to be commended and encouraged for its convenience, for it is to be presumed that the attention of the court being drawn to its excess of jurisdiction, the order or judgment would be vacated on motion without the trouble and expense of certifying the record to a court of review.[13]

Under this rule, an appeal may be taken from an order refusing to set aside an injunction against one who is not a party to an action.[14] And a party defendant not served at all and therefore not having his day in court, and thus having no opportunity for making a record for appeal, should be entitled to the same privilege.[15] Again, an owner of land involved in a suit who is not a party thereto may move to set aside an order irregularly allowing a writ of assistance and appeal from an order denying his motion.[16] This course is permitted also where the first

12. Stensland v. Superior Court, 39 Cal. App. 172, 178 Pac. 549 (refusing certiorari because of remedy by appeal); Estate of Baker, 170 Cal. 578, 150 Pac. 989; Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838; Tattenham v. Superior Court, 155 Cal. 205, 100 Pac. 248; Elliott v. Superior Court, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109; Tingley v. Superior Court, 8 Cal. App. 47, 96 Pac. 20.

13. Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009.

14. Tattenham v. Superior Court, 155 Cal. 205, 100 Pac. 248.

15. Altpeter v. Postal Telegraph-Cable Co., 25 Cal. App. 255, 143 Pac. 93; Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

16. People v. Grant, 45 Cal. 97. See Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, where the court referring to this case says the appellant did not really move to vacate the order but to be restored to possession as one improperly ejected; and see Harper v. Hildreth, 97 Cal. 265, 33 Pac. 1103, in which the

judgment or order was made improperly and ex parte.[17] And, of course, an appeal may be taken from an order denying a motion made under section 473 of the Code of Civil Procedure to vacate a judgment obtained through mistake, inadvertence, surprise or excusable neglect.[18]

In every case where this course has been allowed, the order from which the appeal was taken was within the class of orders made directly appealable by the code. And therefore the court in permitting a direct appeal was merely relieving the appellant from a rule of practice to the effect that an order refusing to vacate a prior appealable order, although described as appealable by the statute, could not be made to take the place of an appeal from the original order.[19] It follows that if the original order is not appealable, an order refusing to vacate it is not appealable, even when the circumstances otherwise authorizing an appeal from a refusal to vacate an order exist.[20] The only theory upon which an appeal could lie from an order refusing to vacate, where such order is not made the subject of a direct appeal by the code, would be that the order refusing to vacate is identical with the original order. Such theory is not tenable in reason, and is inconsistent with the rulings of the court. This is made clear by the holdings to the effect that an appeal from an order refusing to vacate does not stay execution of the original order.[1]

Not only is it necessary that the order sought to be vacated be appealable, but it is also necessary that the motion to vacate it be authorized by law. If not so au-

court cites this case and says: "An exception to the rule is made when the original order was irregularly issued."

17. See infra, § 32.

18. Thompson v. Alford, 128 Cal. 227, 60 Pac. 686; Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538. See infra, § 35.

19. Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838.

20. See supra, § 30.

1. Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838. See infra, § 33.

thorized, no appeal will lie from the order denying the motion.[2]

§ 32. **Ex Parte Orders.**—Another exception to the rule that an appeal cannot be taken from an order refusing to vacate an appealable order exists where the original judgment or order was made improperly and ex parte. In such case the aggrieved party may have no knowledge of the order until after the expiration of the time for appeal, and the only appeal which can avail the appellant is an appeal from an order refusing to vacate, for in no other way, where evidence is submitted, can the appellant present his showing against the order.[3] Thus, a defendant may move to vacate an order allowing a writ of assistance issued on the ex parte application of the grantee of the purchaser of property at a sheriff's sale,[4]

2. Eureka & T. R. R. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360, holding that in a proceeding for condemnation of a right of way for a railroad, an order denying a motion by the plaintiff to set aside a judgment in its favor, on the ground that since the rendition of judgment it had determined to change the line of its road, is not appealable. There is no statutory provision for the motion made, and the contention is untenable that the rule is inapplicable because the motion was based on new matter occurring subsequently to the judgment.

3. Estate of Baker, 170 Cal. 578, 150 Pac. 989 (where an order dismissing a will contest is made after the death of the contestant, the personal representative of the contestant may move to vacate the order of dismissal and to substitute himself as a party, and appeal from an order denying his motion); Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; Gordan v. Graham, 153 Cal. 297, 95 Pac. 145; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48; Green v. Hebbard, 95 Cal. 39, 30 Pac. 202; City of San Jose v. Fulton, 45 Cal. 316.

4. Green v. Hebbard, 95 Cal. 39, 30 Pac. 202; City of San Jose v. Fulton, 45 Cal. 316. It is true that the decision in this case was based upon the fact that the grantee of the purchaser was a stranger to the record, an intruder, and therefore not entitled to the writ of assistance. But in Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, the court says the simple fact is that the court found the rule would operate unjustly and refused to enforce it. The court recognized the fact that to enforce such a rule would be practically to deny an appeal, and it would often amount to the same thing if the party injured is com-

or on the ex parte application of the purchaser himself.[5] This exception is not confined to cases which are strictly ex parte, but extends also to cases where the service is constructive. A motion to set aside the judgment or order is the only proper method of presenting the facts upon which the motion is made, and of getting them into the record.[6] These cases, of course, arise when the motions are made after the time limited by law for the appeal has expired.[7]

§ 33. Enforcement of Judgment.—An appeal may be taken from the following orders relating to the enforcement of judgment, as they are special orders made after final judgment: An order directing the issuance of a writ of assistance;[8] an order directing the issuance of a writ of possession, and an order refusing to set aside the execution of the writ;[9] an order directing the issuance of execution upon default of justification by the sureties on the undertaking on appeal;[10] an order setting aside an execution issued on a judgment and perpetually staying its enforcement;[11] an order refusing to quash an execution;[12] an order directing that money paid into court

pelled to appeal from an ex parte order, where, having no opportunity to make a showing, he cannot present his case to the appellate tribunal.

5. Gordan v. Graham, 153 Cal. 297, 95 Pac. 145 (where, in a partition suit, an ex parte order directing the issuance of a writ of assistance is made, the tenant in possession may move to vacate the order and appeal from the order denying his motion); Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48.

6. De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

7. Estate of Baker, 170 Cal. 578, 150 Pac. 989.

8. Davis v. Donner, 82 Cal. 35, 22 Pac. 879.

9. Gutierrez v. Superior Court, 106 Cal. 171, 39 Pac. 530.

10. Holt v. James, 10 Cal. App. 360, 101 Pac. 1065.

11. Bond v. Pacheco, 30 Cal. 530 (holding that such an order is appealable though it is made at chambers, and that the judge has no jurisdiction to make such an order at chambers).

12. Gilman v. Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

in satisfaction of judgment be retained by the clerk until the determination of proceedings brought to ascertain the right of a claimant to the money;[13] an order made on supplemental proceedings directing a judgment debtor to deliver up property,[14] or directing that a person having in his possession money or property of the defendant to deliver it to the sheriff;[15] an order striking out a stay undertaking and directing the payment of money attached to the prevailing party;[16] an order directing the sale of perishable property;[17] an order directing a receiver to deliver to the prevailing party the premises and property in his possession involved in the action;[18] and an order in a foreclosure suit under section 728 of the Code of Civil Procedure directing the sale of more of the mortgaged property as the principal and interest falls due.[19] An order upon show-cause proceedings requiring a sheriff to sell without an indemnity bond, property held by him under execution is in effect a final judgment against him in a collateral proceeding.[20]

In the case of proceedings on execution against the homestead, the Civil Code provides that when certain judgments are levied on the homestead, the judgment creditor may apply "to the superior court of the county in which the homestead is situated" for the appointment

13. Slavonic Illyric Mutual Ben. Assn. v. Superior Court, 65 Cal. 500, 4 Pac. 500.

14. McCullough v. Clark, 41 Cal. 298 (an appeal may be taken from an order made by a court or referee on proceedings supplementary to execution); Stensland v. Superior Court, 39 Cal. App. 172, 178 Pac. 549 (though the court was without jurisdiction, an appeal will lie).

15. William Deering & Co. v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801; Stensland v. Superior Court, 39 Cal. App. 172, 178 Pac. 549.

16. Southern California Ry. Co. v. Superior Court, 127 Cal. 417, 59 Pac. 789.

17. Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357.

18. Hidden v. Jordan, 1 Cal. Unrep. 216.

19. Byrne v. Hoag, 126 Cal. 283, 58 Pac. 688. See MORTGAGES.

20. Cline v. Superior Court, 35 Cal. App. 150, 169 Pac. 453. See supra, § 21; and see supra, § 15, as to appealability of an order to show cause.

of appraisers.[1] As this application need not be made to the court which rendered the judgment, it is clear that the proceeding is independent of the action, and, therefore, orders made therein are not special orders made after final judgment. An order in such a proceeding which merely amounts to a refusal to give instructions to appraisers is not a final judgment. Nor is an order made after a report of the appraisers showing an excess of value, and remanding the matter to the appraisers for the purpose of making a division of the property, a final judgment. While the code does not make provision for further proceedings after division, the natural course would be for the appraisers to report their action to the court, and for the court thereupon to confirm the report. The order of confirmation would be the final judgment in the proceeding.[2] Where a purchaser at an execution sale has been dispossessed of the property purchased and brings an action to be restored to possession, a judgment of restitution is a final and appealable judgment.[3]

§ 34. Order on Motion for New Trial.—Although prior to 1915 an appeal lay both from an order granting[4] and

1. Civ. Code, § 1245. See HOMESTEAD.

2. Brown v. Starr, 75 Cal. 163, 16 Pac. 760.

3. Loring v. Illsley, 1 Cal. 24.

4. Eades v. Trowbridge, 143 Cal. 25, 76 Pac. 714 (an order setting aside a verdict, is in effect an order for new trial, and an appeal therefrom has the effect of bringing up for review the order impliedly granting a new trial); Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; People v. City of Oakland, 123 Cal. 145, 55 Pac. 772 (decided in 1898 and holding an appeal lies from an order granting or denying a new trial in an action for usurpation of a franchise); Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Ketchum v. Crippen, 31 Cal. 365; Riddle v. Baker, 13 Cal. 295 (holding, under the Practice Act, that an order setting aside a final decree in equity and granting a rehearing is substantially, if not literally, an order granting a new trial and appealable); Brown v. Tolles, 7 Cal. 398; Payne v. Pacific Mail Steamship Co., 1 Cal. 33. See Morris v. De Celis, 41 Cal. 331, entertaining an appeal from an order granting a new trial and from an order refusing to vacate such order.

from an order refusing[5] a new trial, by an amendment to the Code of Civil Procedure in that year appeals from orders denying a new trial were abolished,[6] and an ap-

5. Krotzer v. Clark, 178 Cal. 736, 174 Pac. 657; Swift v. Occidental Mining etc. Co., 141 Cal. 161, 74 Pac. 700; Vinson v. Los Angeles Pacific Ry. Co., 141 Cal. 151, 74 Pac. 757; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103 (holding code section is limited to cases in which a new trial is authorized. If an appeal is taken from an order denying a new trial in a matter wherein a new trial is not authorized, as where a new trial of a motion is denied, the appeal will be dismissed on the ground the court below had no jurisdiction to entertain the motion); Romine v. Cralle, 80 Cal. 626, 22 Pac. 296 (holding that when a motion for new trial is denied, the appeal must be taken from the order of refusal and not from a subsequent order denying a motion thereafter to call it up again for hearing); Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; People v. Center, 61 Cal. 191; Voll v. Hollis, 60 Cal. 569 (following Warden v. Mendocino County, 32 Cal. 655, and treating an order dismissing motion as a denial of the motion); Estate of Keane, 56 Cal. 407; Spanagel v. Dellinger, 38 Cal. 278; Ketchum v. Crippen, 31 Cal. 365; O'Rourke v. Finch, 8 Cal. App. 263, 96 Pac. 784.

6. Heine Piano Co. v. Bloomer, 60 Cal. Dec. 117, 191 Pac. 900; Tucker v. Beneke, 180 Cal. 588, 182 Pac. 299; Rocky v. Vieux, 179 Cal. 681, 178 Pac. 712; Roberts v. Colyear, 179 Cal. 669, 180 Pac. 937; March v. Lapp, 180 Cal. 231, 180 Pac. 533; Friedman v. Southern California Trust Co., 179 Cal. 266, 176 Pac. 442; Watterson v. Cruse, 179 Cal. 379, 176 Pac. 870; Regoli v. Stevenson, 179 Cal. 257, 176 Pac. 158; Wilcox v. Hardisty, 177 Cal. 752, 171 Pac. 947; Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019; Schmitt v. White, 172 Cal. 554, 558, 158 Pac. 216; San Francisco O. T. Rys. v. Superior Court, 172 Cal. 541, 157 Pac. 604; Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475; McCahan v. McCahan, 31 Cal. App. Dec. 1107, 190 Pac. 460; Verdier v. Stall, 31 Cal. App. Dec. 696, 188 Pac. 826; Visscher v. Dixon, 31 Cal. App. Dec. 539, 188 Pac. 1029; Avery v. Hagenois, 30 Cal. App. Dec. 985, 187 Pac. 119; Ward v. Gildea, 30 Cal. App. Dec. 565, 186 Pac. 612; United Casting Co. v. Duncan (Cal. App.), 186 Pac. 403; Ward v. Gildea, 30 Cal. App. Dec. 565, 186 Pac. 612; Williams Co. v. Leong Sue Ah Quin, 30 Cal. App. Dec. 531, 532, 186 Pac. 401; Garau v. Marchetti, 30 Cal. App. Dec. 499, 500, 186 Pac. 193; Norman B. Livermore & Co. v. Guardian Casualty & Guaranty Co., 30 Cal. App. Dec. 137, 185 Pac. 413; Anderson v. Adler, 29 Cal. App. Dec. 623, 184 Pac. 42; San Joaquin Light & Power Co. v. Barlow, 29 Cal. App. Dec. 821, 184 Pac. 899; Whitcomb v. Giannini, 29 Cal. App. Dec. 779, 184 Pac. 887; Smith v. Bach, 29

peal from an order granting a new trial was allowed only in an action or proceeding tried by a jury where such trial by jury is a matter of right.[7] Under the amendment of 1915, no appeal lies from an order granting a new trial in an action at law tried by the court without a jury, or in an action in equity which is tried by a jury.[8] But in those cases in which the order is appealable, the party complaining should appeal from the order within the time allowed by law, as he will not be allowed after taking his chances upon a second trial to rely on any error in granting the new trial.[9]

With reference to orders denying new trials, the code provides for a settlement of the bill of exceptions after the determination of the proceeding on the motion so as to bring up the proceedings thereon for review on an appeal from the judgment.[10]

Because they are special orders made after final judgment, it has been held that an appeal may be taken from an order striking from the files affidavits on a motion for a new trial;[11] an order denying a motion to be relieved from a failure to serve in time a notice of intention

Cal. App. Dec. 625; Saylor v. Taylor, 29 Cal. App. Dec. 449, 183 Pac. 843; Nadeau v. Lynch (Cal. App.), 183 Pac. 278; Runyon v. Los Angeles, 40 Cal. App. 383, 180 Pac. 837; Dorris v. McKamy, 40 Cal. App. 267, 180 Pac. 645; Ford v. Freeman, 40 Cal. App. 221, 180 Pac. 545; Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46; Nathan v. Porter, 36 Cal. App. 356, 172 Pac. 170; Watt v. Bekins Van & Storage Co., 35 Cal. App. 776, 171 Pac. 832; White v. Hendley, 35 Cal. App. 267, 169 Pac. 710; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121; Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858; Hester v. McMullan, 29 Cal. App. 664, 157 Pac. 521. See Cambuston v. United States, 95 U. S. 285, 24 L. Ed. 448, holding under the federal practice that no appeal lies from an order refusing a new trial.

7. Code Civ. Proc., § 963, subd. 2; Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 Pac. 92.

8. Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712.

9. Brown v. Folles, 7 Cal. 398.

10. United Casting Co. v. Duncan (Cal. App.), 186 Pac. 403; J. W. Williams Co. v. Leong Sue Ah Quin (Cal. App.), 186 Pac. 401. See infra, § 266 et seq., as to preparation of bill of exceptions and review on appeal from the judgment.

11. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540; Gay v. Torrance,

to move for a new trial;[12] an order denying a motion to call in another judge to preside at the hearing of the motion;[13] and an order dismissing a motion for a new trial.[14] A refusal to dismiss a motion for new trial, however, does not finally dispose of the motion, and neither party can be said to be aggrieved thereby.[15]

§ 35. Bills of Exceptions and Statements on New Trial. No appeal lies from an order refusing to settle a bill of exceptions or, under the former practice, a statement on new trial. If the party has complied with the law and the trial judge erroneously concludes that he has not so complied and refuses to settle the bill or statement, the proper and exclusive remedy is mandamus to compel the settlement.[16] But if the party has not complied with the requirements of the law in the matter of the presentation of his proposed bill of exceptions, he is not entitled to have the same settled unless relieved by the court from his default under section 473 of the Code of Civil Procedure. He is required to move for relief under this section, and if the court refuses to grant relief, to appeal from the order of refusal.[17] Mandamus is not a proper remedy in

143 Cal. 169, 76 Pac. 973, refusing mandamus to compel the vacation of an order striking out affidavits because contumelious, on the ground that the party had a remedy by appeal from such order. But see Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, holding an order striking out amended affidavits to be unappealable.

12. Steen v. Santa Clara V. M. & L. Co., 145 Cal. 564, 79 Pac. 171.

13. Mercantile Trust Co. v. Sunset Road Oil Co., 173 Cal. 487, 160 Pac. 545.

14. McDonald v. McConkey, 57 Cal. 325 (decided before 1915).

15. Griess v. State Investment & Ins. Co., 93 Cal. 411, 28 Pac. 1041.

16. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176; Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; Freeman v. Brown, 4 Cal. App. 108, 87 Pac. 204 (per Smith, J., concurring); Miller v. American Central Ins. Co., 2 Cal. App. 271, 83 Pac. 289.

17. Brode v. Goslin, 158 Cal. 699, 701, 112 Pac. 280; Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176; Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Clark v. Crane, 57 Cal. 629, 634; Freeman v. Brown, 5 Cal. App. 516, 90 Pac. 970 (hold-

such case, as the granting of relief rests in the discretion of the court, and as the order is necessarily final, it can be corrected, if at all, by a direct appeal therefrom.[18] An order granting such an application is merely an intermediate step in the proceeding and reviewable only on appeal from the order on motion for new trial.[19] The settlement of a bill of exceptions or statement is simply a certificate of the judge. It is not an order and therefore is not appealable.[20]

Under the former practice, an order striking out a statement on motion for new trial was appealable as a special order after judgment.[1] But the following orders were not thus appealable: An order allowing a party to amend his statement,[2] or refusing to amend the bill of exceptions settled and certified by the court,[3] and an order denying

ing an order refusing to allow a supplemental amendment to the statement under section 473 of the code is appealable); Freeman v. Brown, 4 Cal. App. 108, 87 Pac. 204.

18. Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176; Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50. See MANDAMUS.

19. Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497 (distinguished in Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176, and in Mercantile Trust Co. v. Sunset Road Oil Co., 173 Cal. 487, 160 Pac. 545); Kramm v. Stockton Electric R. R. Co., 22 Cal. App. 761, 136 Pac. 534; Kramm v. Stockton Electric R. R. Co., 22 Cal. App. 737, 136 Pac. 523. See Jue Fook Sam v. Lard, 83 Cal. 159, 23 Pac. 225, not deciding the question. See supra, § 34, as to appealability of orders on new trial.

20. Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Henry v. Merguire, 106 Cal. 142, 145, 39 Pac. 599; Leffingwell v. Griffing, 29 Cal. 192.

1. Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Sutton v. Symons, 100 Cal. 576, 35 Pac. 158; Sutton v. Symons, 97 Cal. 475, 32 Pac. 588; Clark v. Crane, 57 Cal. 629, 634; Calderwood v. Peyser, 42 Cal. 110 (overruling Quivey v. Gambert, 32 Cal. 305; Genella v. Relyea, 32 Cal. 159; Pendegast v. Knox, 32 Cal. 73). See De Mitchell v. Croake, 20 Cal. App. 643, 129 Pac. 946, "conceding" the order to be appealable.

2. Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Yerian v. Lenkletter, 80 Cal. 135, 22 Pac. 70; De Barry v. Lambert, 10 Cal. 503.

3. Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773.

a motion to strike out or set aside a statement on new trial.[4]

§ 36. Provisional Remedies.—The Code of Civil Procedure expressly authorizes the taking of an appeal from an order dissolving[5] or refusing to dissolve[6] an attachment. It has been contended that this provision relates only to orders made under section 556 of the code, which provides for discharging the writ of attachment where "the same was improperly or irregularly issued," and that it does not apply to orders for the release of attached property on the ground that it was not liable to seizure. But this contention was held unsound, the court saying that the word "attachment" in this code section is quite broad enough to include seizure and custody under the writ as well as the writ itself.[7] But an order denying an application for an order directing the sale of perishable personal property seized under an attachment is not appealable, as the proceeding in which it is applied for is merely in aid of the main relief sought in the action, and the order cannot be regarded as a final judgment.[8]

Receivers.—While the code specifically provides that an order appointing a receiver is appealable,[9] it makes no

4. Ketchum v. Crippen, 31 Cal. 365; De Barry v. Lambert, 10 Cal. 503.

5. Code Civ. Proc., § 963, subd. 2; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81.

6. Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49. Under the Practice Act, no appeal would lie. Myers v. Mott, 29 Cal. 359, 362, 89 Am. Dec. 49; Allender v. Fritts, 24 Cal. 447 (overruling Taaffe v. Rosenthal, 7 Cal. 515; Griswold v. Sharpe, 2 Cal. 17). See ATTACHMENT.

7. Risdon Iron & Locomotive Wks. v. Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, cited with approval in Rosenthal v. Perkins, 123 Cal. 240, 244, 55 Pac. 804.

8. Henry Cowell Lime & Cement Co. v. Figel, 27 Cal. App. 11, 148 Pac. 796. See ATTACHMENT.

9. Code Civ. Proc., § 963, subd. 2; Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838; Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204,

provision for an appeal from an order refusing to vacate such appointment,[10] or from an order discharging a receiver.[11] A receiver may appeal directly from an order made before judgment disallowing his final account,[12] but an order approving a current account of a receiver which shows on its face that it is not final, is not appealable.[13] An order settling the final account of a receiver, and directing the payment of his compensation by one of the parties, though made before final judgment in the action in which he is appointed, is a final determination of the rights of the parties as to such matter and is appealable as such.[14] And an order after judgment directing a sale by a receiver of the property of the husband for the purpose of satisfying a judgment of alimony is appealable as a special order made after final judgment.[15]

§ 37. **Injunctions.**—Under the Practice Act as amended in 1854 and section 963 of the Code of Civil Procedure, a direct appeal is authorized from an order granting[16] or

65 Pac. 826; First Nat. Bank v. Superior Court, 12 Cal. App. 335, 347, 107 Pac. 322; California Fruit Growers' Assn. v. Superior Court, 8 Cal. App. 711, 97 Pac. 769 (holding an ex parte order appointing a receiver to preserve the assets of a corporation after removal of the directors is appealable by virtue of this provision even when made without jurisdiction). See Emeric v. Alvarado, 64 Cal. 529, 622, 2 Pac. 418; French Bank Case, 53 Cal. 495, decided before the amendment of 1897 authorizing an appeal. See, also, RECEIVERS.

10. Title Ins. & Trust Co. v. California Dev. Co., 159 Cal. 484, 114 Pac. 838. See supra, § 30.

11. Edwards v. Western Land & Power Co., 27 Cal. App. 724, 151 Pac. 16.

12. See Rochat v. Gee, 91 Cal. 355, 27 Pac. 670.

13. Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; Heinze v. Butte & Boston Consol. Min. Co., 129 Fed. 337, 64 C. C. A. 15.

14. See supra, § 21.

15. White v. Superior Court, 110 Cal. 54, 42 Pac. 471. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, pp. 1041, 1053; and see RECEIVERS.

16. Doudell v. Shoo, 159 Cal. 448, 453, 114 Pac. 579; Devlin v. Ryberg, 132 Cal. 324, 64 Pac. 396; Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278; Golden Gate Consol. H. Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Sullivan v. Triunfo Gold & Silver Min. Co., 33 Cal. 385; Martin v. Travers, 7 Cal. 253; Crandall v. Woods, 6 Cal. 449.

dissolving,[17] an injunction. Though the Practice Act as amended in 1854 did not authorize the taking of an appeal from an order refusing to grant or dissolve an injunction, both of these orders are now appealable.[18] These provisions make no distinction between injunctions granted ex parte and injunctions granted on notice,[19] and as temporary restraining orders require the defendant to refrain from doing some act, it follows that they, though temporary, are injunctions within the meaning of the statutes relating to appeals,[20] and that an appeal may be taken from an ex parte order granting such temporary restraining order.[1] The fact that such ex parte order may be vacated or modified without notice does not deprive the party of his remedy by appeal. These are cumulative remedies, and the defendant may pursue either remedy.[2] If the defendant makes a motion to dissolve a temporary restrain-

17. Wolf v. Board of Supervisors, 143 Cal. 333, 76 Pac. 1108. See Fremont v. Merced Min. Co., 9 Cal. 18, holding an order modifying an injunction appealable under an act authorizing appeal from an order which affects a substantial right. See, also, INJUNCTIONS.

18. Code Civ. Proc., § 963, subd. 2; Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512 (an order refusing to dissolve an injunction is appealable). See Martin v. Travers, 7 Cal. 253 (holding under Practice Act as amended in 1854 that an order refusing to dissolve an injunction is not appealable); and see Richards v. McMillan, 6 Cal. 422 (holding an order refusing to grant an injunction not appealable).

19. Sullivan v. Triunfo Gold & Silver Min. Co., 33 Cal. 385.

20. Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512; Laam v. McLaren, 28 Cal. App. 632, 153 Pac. 985.

1. Sullivan v. Triunfo Gold & Silver Min. Co., 33 Cal. 385 (the order is appealable though made at chambers); Laam v. McLaren, 28 Cal. App. 632, 153 Pac. 985. See San Francisco v. Beideman, 17 Cal. 443, where an appeal was entertained without passing on the question.

2. Sullivan v. Triunfo Gold & Silver Min. Co., 33 Cal. 385. The fact that these remedies are cumulative is shown by the history of the statutes. In 1851, the only remedy before final judgment against an ex parte order granting an injunction was by motion to dissolve it. In 1854, the order granting the injunction was made appealable. The latter provision was subsequent and clearly indicated an intention to provide a further remedy.

ing order, an order denying such motion is likewise appealable as an order refusing to dissolve an injunction.[3]

After the defendant has answered, an injunction cannot be granted except upon notice or an order to show cause. An order on notice granting a preliminary injunction is clearly appealable under the code.[4] But a refusal of an application for an order to show cause why an injunction should not issue is not an order refusing to grant an injunction within the meaning of the code.[5] Where no right is given by the law to move for the dissolution of an order on notice granting an injunction, an order granting such a motion will be reversed on appeal,[6] while an order denying such a motion will be affirmed.[7] An order modifying a preliminary injunction by striking out the portion which is mandatory in character has the effect of dissolving it, within the meaning of the statute, and is the subject of a direct appeal.[8]

On the rendition of final judgment in the action granting a permanent injunction, any preliminary injunction that has been granted becomes merged therein and loses its operative force. There is thereafter no existing order granting an injunction from which a direct appeal may be taken.[9] Where after an appeal from a final judgment granting an injunction the trial court makes an order

3. Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512. See Hobbs v. Amador & Sacramento Canal Co., 66 Cal. 161, 4 Pac. 1147, wherein the right to appeal was not questioned. See Knight v. Cohen, 5 Cal. App. 296, 90 Pac. 145, not deciding whether such order is appealable.

4. Curtiss v. Bachman, 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910; Natoma Water & Min. Co. v. Parker, 16 Cal. 83; Curtis v. Sutter, 15 Cal. 259, 265; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544; Ots v. Superior Court, 10 Cal. App. 168, 101 Pac. 431.

5. Grant v. Johnston, 45 Cal. 243.

6. Natoma Water & Mining Co. v. Parker, 16 Cal. 83; Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544. See Ots v. Superior Court, 10 Cal. App. 168, 101 Pac. 431, annulling the order on writ of review.

7. Curtis v. Sutter, 15 Cal. 259, 265.

8. Wolf v. Board of Supervisors, 143 Cal. 333, 76 Pac. 1108.

9. Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439.

restraining the defendant from doing the acts inhibited by the final judgment, the later order is appealable as an order granting an injunction or as a special order after judgment. The fact that the trial court may have no jurisdiction to make it does not preclude an appeal.[10]

§ 38. **Partition Suits.**—Since 1864, the statute has specifically authorized the taking of an appeal from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made.[11] Prior thereto such a judgment was reviewable on appeal from the judgment in an action for partition entered upon the confirmation of the report of the commissioners appointed to make the partition, which is a final judgment and appealable as such.[12] An interlocutory decree in a partition suit directing a sale of the common property is to be regarded as a final judgment with respect to subsequent orders in aid of its execution. Such a decree not only determines the several interests of the cotenants, the amounts and priorities of the several liens, but also adjudges the property incapable of partition and directs that it be sold and that the proceeds be distributed by the referee.[13] Further-

10. Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278. See infra, § 40, as to appeals from void orders. And see INJUNCTIONS.

11. Code Civ. Proc., § 963, subd. 2; Stats. 1863–64, p. 223; Holt v. Holt, 131 Cal. 610, 63 Pac. 912; Quirk v. Rooney, 130 Cal. 505, 62 Pac. 825; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Barry v. Barry, 56 Cal. 10; Regan v. McMahon, 43 Cal. 625; Gates v. Salmon, 28 Cal. 320, distinguished in Bensley v. Ellis, 39 Cal. 309, 314. See the following cases decided under the prior law: Peck v. Courtis, 31 Cal. 207; Peck v. Vandenberg, 30 Cal. 11, 21. And see PARTITION.

12. Peck v. Vandenberg, 30 Cal. 11, 21. See infra, § 44. Inasmuch as the interlocutory order is now directly appealable, it is not reviewable on the appeal from the final judgment.

13. Gordan v. Graham, 153 Cal. 297, 95 Pac. 145 (overruling Rovegno v. Hunt, 83 Cal. 445, 23 Pac. 524, and holding the order must be considered as a final judgment both as to the purchaser at the sale and as to adverse parties, so as to authorize appeals by them from subsequent orders); Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607.

more, an appeal may be taken from the following orders as special orders after final judgment; an order confirming the sale of the common property,[14] or refusing to confirm the sale,[15] an order directing the issuance of a writ of assistance,[16] and an order refusing to vacate such an order when made ex parte.[17]

§ 39. Certiorari, Mandamus, Prohibition and Quo Warranto.—There is not in the present, nor was there in the former constitutions, any provision conferring appellate jurisdiction in cases of mandamus, certiorari, prohibition or quo warranto. Under the former constitutions this jurisdiction was repeatedly exercised, and as the provisions relating to this subject were copied into the later constitutions without change, it will be presumed that it was done with knowledge of the interpretation given to it, and with the intention of adopting that construction.[18] Moreover, the code classifies as special proceedings, proceedings to procure the writs of mandamus,[19] certiorari or review,[20] and prohibition.[1] And final judgments therein are appealable as final judgments in special proceedings.[2] Accordingly, an appeal will lie from an order of a superior court granting an application for a writ of mandamus,[3] an order denying such application,[4] a judgment

14. Gordan v. Graham, 153 Cal. 297, 95 Pac. 145; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607.

15. Dunn v. Dunn, 137 Cal. 51, 69 Pac. 847.

16. Gordan v. Graham, 153 Cal. 297, 95 Pac. 145.

17. Gordan v. Graham, 153 Cal. 297, 95 Pac. 145. See supra, § 31, as to when an appeal may be taken from an order refusing to vacate a prior order.

18. Palache v. Hunt, 64 Cal. 473, 2 Pac. 245.

19. Ballagh v. Superior Court, 25 Cal. App. 149, 142 Pac. 1123.

20. See CERTIORARI.

1. See PROHIBITION.

2. See supra, § 16.

3. Palache v. Hunt, 64 Cal. 473, 2 Pac. 245; Ballagh v. Superior Court, 25 Cal. App. 149, 142 Pac. 1123. See Santa Cruz Gap Tp. J. S. Co. v. Santa Clara Co., 62 Cal. 40, semble. See MANDAMUS.

4. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; People ex rel. Leverson v. Thompson, 66 Cal. 398, 5 Pac. 686 (refusing to entertain an original petition after a denial of the writ by the superior court, because of the existence of the remedy by appeal from the

rendered on the return to a writ of review either affirming or annulling or modifying the proceedings in the court below,[5] or denying the writ.[6] But a minute order dismissing a petition for a writ of review, after the writ was granted, is not an appealable order, where no hearing has been had and the matter is still pending.[7]

With reference to proceedings in the nature of quo warranto, the fact that the legislature may have changed the procedure, enlarged the remedy and given it a new name, cannot operate to deprive a party of his remedy by appeal.[8]

§ 40. Void Judgments and Orders.—It has been repeatedly held that an appeal may be taken from an order or judgment notwithstanding the fact that it is void.[9] The appealability of an order is determined by what it purports to decide or adjudicate, and not by its actual operative effect. If it is one of the orders or judgments enumerated by the code as appealable, the fact that it is unenforceable does not deprive the party aggrieved of his right to appeal.[10] He may appeal from it and have it set

order of the superior court); Palache v. Hunt, 64 Cal. 473, 2 Pac. 245; Santa Cruz Gap Tp. J. S. Co. v. Santa Clara County, 62 Cal. 40, semble.

5. Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366 (overruling Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113); Morley v. Elkins, 37 Cal. 454; Winter v. Fitzpatrick, 35 Cal. 269 (overruling People v. Carman, 18 Cal. 693); Frede v. Justice's Court, 30 Cal. App. 85, 157 Pac. 528.

6. Beaumont v. Samson, 4 Cal. App. 701, 89 Pac. 137. See CERTIORARI.

7. Frede v. Justice's Court, 30 Cal. App. 85, 157 Pac. 528.

8. People v. Perry, 79 Cal. 105, 21 Pac. 423. See QUO WARRANTO.

9. Ewing v. Richvale Land Co., 176 Cal. 152, 167 Pac. 876 (appeal from deficiency judgment in foreclosure suit docketed without authority); Jameson v. Simonds Saw Co., 144 Cal. 3, 77 Pac. 662; Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 Pac. 724; Kaufman v. Superior Court, 108 Cal. 446, 41 Pac. 476; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; Page v. Superior Court, 76 Cal. 372, 18 Pac. 385; In re Bullock, 75 Cal. 419, 17 Pac. 540.

10. Estate of Bullock, 75 Cal. 419, 17 Pac. 540; Livermore v. Campbell, 52 Cal. 75.

aside as cumbering the records.[11] And it cannot be successfully contended that by appealing therefrom he concedes that there is a proper judgment. He concedes only that there is a judgment in form, which he claims is erroneous to the extent of rendering it void.[12]

The appellate jurisdiction of the supreme court and of the district courts of appeal over the judgments of superior courts include those in which that court wrongfully assumed jurisdiction as well as those in which it was properly entertained. If the court of review should refuse to take jurisdiction in such case, the judgment would remain as originally pronounced.[13] So an appeal may be taken from a judgment rendered by a judge whose term of office had expired,[14] and where a judgment of dismissal is entered by a clerk at the direction of the plaintiff, notwithstanding a counterclaim or cross-complaint.[15]

On the other hand, the mere fact that a judgment or order is unauthorized and void, does not make it appealable if it is not one of the judgments or orders which are made appealable by the code. And in passing on the appealability of a particular judgment or order on the hearing of a motion to dismiss, the appellate court will examine only the order itself. It will not review the authority of the trial court to make it.[16]

§ 41. **Default and Consent Judgments.**—As to the right of appeal, there is no distinction between judgments by

11. Page v. Superior Court, 76 Cal. 372, 18 Pac. 385.

12. Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

13. White v. Superior Court, 110 Cal. 54, 42 Pac. 471; Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Bond v. Pacheco, 30 Cal. 530; California Fruit Growers' Assn. v. Superior Court, 8 Cal. App. 711, 97 Pac. 769

14. Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

15. Page v. Superior Court, 76 Cal. 372, 18 Pac. 385.

16. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103, where a new trial of a motion was denied.

default and judgments after issue joined. The former is as much a final judgment as the latter.[17] While it has generally been held that a default judgment is in effect a judgment by consent, and that a direct appeal will not lie from a consent judgment, it is well settled that an appeal may be taken from a judgment by default entered by the clerk.[18] This right is unaffected by the existence of a remedy by motion in the superior court to set the judgment aside.[19] No appeal, however, lies from an order entering a default against a party,[20] or from an order refusing to enter a default,[1] or from an order granting[2] or denying[3] a motion to vacate a default upon which no judgment has been given. The latter order is not an order after judgment, and it is not one of the interlocutory orders enumerated in section 963 of the code.[4] But an order made after judgment, refusing upon the motion of

17. Jameson v. Simonds Saw Co., 144 Cal. 3, 77 Pac. 662; Howard v. Galloway, 60 Cal. 10 (holding that Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490, and cases following it are virtually overruled in Hallock v. Jaudin, 34 Cal. 167); Tregambo v. Comanche Mill & Min. Co., 57 Cal. 501; Hallock v. Jaudin, 34 Cal. 167; Stevens v. Ross, 1 Cal. 94.

18. Lemon v. Hubbard, 10 Cal. App. 471, 102 Pac. 554.

19. See supra, § 6, as to effect of other remedy upon right to appeal.

20. Thompson v. Alford, 128 Cal. 227, 60 Pac. 686; Ricketson v. Compton, 23 Cal. 636, 650. See infra, § 67, as to matters reviewable on appeal from a judgment.

1. Brown v. Sterling Furniture Co., 175 Cal. 563, 166 Pac. 322; Broadribb v. Tibbetts, 60 Cal. 412 (an order denying defendant's motion for judgment by default on his cross-complaint).

2. Savage v. Smith, 154 Cal. 325, 97 Pac. 821 (limiting contrary remarks in Gibson v. Superior Court, 83 Cal. 643, 24 Pac. 152); Lapique v. Plummer, 24 Cal. App. 685, 142 Pac. 107; Rose v. Lelande, 17 Cal. App. 308, 119 Pac. 532; Rauer's Law & Collection Co. v. Standley, 3 Cal. App. 44, 84 Pac. 214.

3. Sherman v. Standard Mines Co., 166 Cal. 524, 137 Pac. 249; Tregambo v. Comanche M. & M. Co., 57 Cal. 501, 503; Scotland v. East Branch Min. Co., 56 Cal. 625; Timmons v. Coonley, 39 Cal. App. 35, 179 Pac. 429.

4. Timmons v. Coonley, 39 Cal. App. 35, 179 Pac. 429; Rauer's Law & Collection Co. v. Standley, 3 Cal. App. 44, 84 Pac. 214.

the plaintiff to set aside the default of the defendant and fix a time in which to plead, is appealable.[5]

§ 42. Miscellaneous Judgments and Orders.—A judgment rendered in a suit of the people under section 11 of the Bank Commissioners' Act, which adjudges that the defendant bank is insolvent, and otherwise adjudges as provided in the act, is a final and appealable judgment. And this is true, notwithstanding the judgment, by its terms, is until further order of court, as such injunction cannot properly be dissolved prior to the settlement of the affairs of the bank.[6] While the code expressly authorizes an appeal from an interlocutory order in actions to redeem property from a mortgage thereof or lien thereon, determining such right to redeem and directing an accounting,[7] it does not authorize an appeal from an interlocutory judgment for an accounting in an action to enforce a constructive trust where no lien exists.[8] Nor will an appeal lie from an order directing an assignee for the benefit of creditors of an insolvent to account,[9] or an order refusing to set aside a stipulation.[10]

Orders on motion for change of venue or transfer of cause.—The code specifically authorizes the taking of an appeal from an order changing[11] or refusing to change[12] a place of trial; but it makes no provision for an appeal from an order made before judgment refusing to trans-

5. See supra, § 32.

6. People ex rel. Bank Commissioners v. Bank of Mendocino County, 133 Cal. 107, 65 Pac. 124. See BANKS.

7. Code Civ. Proc., § 963, subd. 2.

8. Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014; Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

9. Rosenthal, Feder & Co. v. Levy, 73 Cal. 9, 14 Pac. 368 (such order is not a final order).

10. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352.

11. Code Civ. Proc., § 963, subd. 2. But see the following cases decided under previous statutes when such order was not appealable: Martin v. Travers, 7 Cal. 253; Juan v. Ingoldsby, 6 Cal. 438.

12. Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981; Juan v. Ingoldsby, 6 Cal. 439; Starkey v. Parker (Cal. App.), 186 Pac. 195. See TRIAL.

fer a cause to a federal court for trial,[13] or from an order refusing to set aside such an order.[14] The remedy in such cases rests in proceedings by mandamus.[15]

Judgment pursuant to mandate of appellate court.— The right to appeal from a judgment entered in a superior court by direction of an appellate court undoubtedly exists.[16] For some purposes the judgment entered pursuant to such direction is on a par with a judgment of the appellate court, but great injustice might be done if such judgment were not appealable, as serious doubts may arise as to whether the judgment entered is the judgment ordered.[17] If the lower court enters a judgment not in accordance with the directions of an appellate court, the error may be corrected on appeal,[18] but if the judgment is in strict compliance with the mandate, there is no ground for an appeal and the judgment will be affirmed.[19]

III. APPEALS FROM ORDERS AND DECREES IN PROBATE.

§ 43. In General.—The constitution confers upon the supreme court jurisdiction "in all such probate matters as may be provided by law."[20] It follows that the right

13. Brooks v. Calderwood, 19 Cal. 124; Hopper v. Kalkman, 17 Cal. 517.

14. Tripp v. Santa Rosa St. R. R., 69 Cal. 631, 11 Pac. 219; 144 U. S. 126, 36 L. Ed. 371, 12 Sup. Ct. Rep. 655. See supra, § 30.

15. Hopper v. Kalkman, 17 Cal. 517. See MANDAMUS.

16. Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69; Randall v. Duff, 107 Cal. 33, 40 Pac. 20; Randall v. Duff, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803.

17. Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; Randall v. Duff, 107 Cal. 33, 40 Pac. 20.

18. Lambert v. Bates, 148 Cal. 146, 82 Pac. 767.

19. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 223, 54 Pac. 731; Ricketson v. Compton, 23 Cal. 636, 650.

20. Const., art. VI, § 4. See COURTS; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Estate of Moore, 68 Cal. 394, 9 Pac. 315.

of appeal in probate matters is purely statutory, and exists only in those cases in which it is given by statute.[1]

The particular orders and judgments in probate proceedings from which appeals are allowed are enumerated in subdivision 3 of section 963 of the Code of Civil Procedure, and it is well established that appeals in probate matters may be taken only from the judgments or orders therein mentioned.[2]

Subdivision 1 of section 963, establishing the right to appeal from final judgments in actions or proceedings generally, does not apply to probate proceedings, regardless of the fact that for certain purposes a proceeding in probate is a civil case or a special proceeding, or of the fact that within certain views an order in probate is a final judgment.[3] So, also, subdivision 2 of section 963, establishing the right to appeal from orders after final judgment, has often been held not to apply to probate proceedings. If the rule were otherwise, the code provision relating to appeals in probate matters could be disregarded by assuming that a probate matter not mentioned therein is a final judgment, and an order refusing to revoke it is a "special order made after final judgment."[4]

1. In re Allen's Estate, 175 Cal. 356, 165 Pac. 1011; Estate of Funkenstein, 170 Cal. 594, 150 Pac. 987; Estate of Cahill, 142 Cal. 628, 76 Pac. 383; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; In re Ohm, 82 Cal. 160, 22 Pac. 927; In re Williams' Estate, 3 Cal. Unrep. 788, 32 Pac. 241; Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

2. Estate of Allen, 175 Cal. 356, 165 Pac. 1011; Estate of Spafford, 175 Cal. 52, 165 Pac. 1; Estate of Cahill, 142 Cal. 628, 76 Pac. 383; Estate of Franklin, 133 Cal. 584, 588, 65 Pac. 1081; Estate of Hickey, 121 Cal. 378, 53 Pac. 818; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393; In re Walkerly, 94 Cal. 352, 29 Pac. 719; Estate of Calahan, 60 Cal. 232; Blum v. Brownstone Bros., 50 Cal. 293; In re Seymour, 15 Cal. App. 287, 114 Pac. 1023.

3. Estate of Franklin, 133 Cal. 584, 65 Pac. 1081; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; In re Ohm, 82 Cal. 160, 22 Pac. 927.

4. Estate of Allen, 175 Cal. 356, 165 Pac. 1011; Estate of Cahill, 142 Cal. 628, 76 Pac. 383; Estate

The fact that a particular order not enumerated in the code section is in excess of jurisdiction does not render such order appealable regardless of the code. If the order is in excess of jurisdiction, the party aggrieved must pursue some other appropriate remedy.[5] This rule is subject to the limitation that an appeal will lie from an order on motion for a new trial, in those proceedings in probate in which such a motion is proper.[6] The provision in subdivision 2 of section 963 authorizing an appeal from such orders embraces them whether made in probate proceedings or in civil actions, as section 1714 of the code provides that the provision of part II of the code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title (relating to probate proceedings), apply to the proceedings mentioned in this title.[7]

§ 44. Particular Orders Appealable.—With reference to the particular orders in probate proceedings which are directly appealable, subdivision 3 of section 963 of the Code of Civil Procedure authorizes the taking of an appeal in the following cases: From a judgment or order granting or refusing to grant, revoking or refusing to

of Winslow, 128 Cal. 311, 60 Pac. 931; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393; Iversen v. Superior Court, 115 Cal. 27, 46 Pac. 817; In re Smith, 98 Cal. 636, 33 Pac. 744; Estate of Walkerly, 94 Cal. 352, 29 Pac. 719; In re Seymour, 15 Cal. App. 287, 114 Pac. 1023.

5. In re Seymour, 15 Cal. App. 287, 114 Pac. 1023, the remedy would lie in a direct attack upon the court's action in usurping jurisdiction or exercising unauthorized power.

6. Estate of Allen, 175 Cal. 356, 165 Pac. 1011; Estate of Sutro, 152 Cal. 249, 257, 92 Pac. 486, 1027; Hartmann v. Smith, 140 Cal. 461, 467, 74 Pac. 7; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; In re Heldt, 98 Cal. 553, 33 Pac. 549 (dismissing appeal as a motion for new trial was not authorized in the particular case); Estate of Spencer, 96 Cal. 448, 31 Pac. 453; In re Bauquier, 88 Cal. 302, 313, 26 Pac. 178, 532; Estate of Doyle, 68 Cal. 132, 8 Pac. 691; Estate of Keane, 56 Cal. 407.

7. In re Bauquier, 88 Cal. 302, 315, 26 Pac. 178, 532, on denying a rehearing.

revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale or conveyance of real property; or settling an account of an executor, administrator or guardian; or refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead; or from an order or decree fixing an inheritance tax or determining that no inheritance tax is due.[8]

The following orders in probate, not being mentioned in this subdivision of section 963, are, therefore, not appealable:[9] An order refusing to vacate an order setting apart a homestead to the widow of a decedent;[10] an order setting aside all proceedings subsequent to the petition to have property set apart on the ground that no citation had been issued or served;[11] an order pursuant to section 1399 of the Code of Civil Procedure, requiring the personal representative to give further security;[12] an order compelling an administratrix to allow her name to be used by a creditor of the estate in an action to set aside a fraudulent conveyance of the decedent;[13] an order refusing to vacate an order denying compensa-

8. Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938 (order setting apart homestead); Estate of Burns, 54 Cal. 223 (order setting apart homestead to widow of deceased).

9. Estate of Funkenstein, 170 Cal. 594, 150 Pac. 987.

10. Estate of Cahill, 142 Cal. 628, 76 Pac. 383.

11. Estate of Johnson v. Tyson, 45 Cal. 257, distinguished in Estate of West, 162 Cal. 352, 122 Pac. 953.

12. Estate of McPhee, 10 Cal. App. 162, 101 Pac. 530.

13. In re Ohm, 82 Cal. 160, 22 Pac. 927.

tion to an executor for extraordinary services;[14] an order determining the right to a legacy;[15] an order refusing to quash an execution;[16] an order permitting the amendment of a statement on motion for new trial made after a judgment refusing to admit a will to probate;[17] an order refusing to grant relief, under section 473 of the Code of Civil Procedure, from failure to present a bill of exceptions to be used on an appeal from an order in probate;[18] an order fixing place for interment of the body of a decedent or an order refusing to vacate such an order;[19] an order adjudging an executor in contempt for refusing to comply with a decree of distribution;[20] an order finally discharging an executor or administrator;[1] and an order refusing to compel the clerk to pay over certain funds in his hands belonging to the estate.[2]

Payment of claim.—The Code of Civil Procedure specifically allows the taking of an appeal from an order directing the payment of a debt, claim, legacy or distributive share,[3] or refusing payment thereof.[4] While technically a "claim" against the estate of a deceased person has reference to such demands or debts against the decedent as existed and if due might have been en-

14. In re Walkerly, 94 Cal. 352, 29 Pac. 719.

15. Estate of Casement, 78 Cal. 136, 20 Pac. 362.

16. Blum v. Brownstone Bros., 50 Cal. 293.

17. In re Smith, 98 Cal. 636, 33 Pac. 744.

18. Estate of Allen, 175 Cal. 356, 165 Pac. 1011.

19. In re Seymour, 15 Cal. App. 287, 114 Pac. 1023.

20. Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393 (People v. O'Neil, 47 Cal. 109, to the contrary, has been twice overruled). See CONTEMPT.

1. Nason v. Superior Court, 39 Cal. App. 448, 179 Pac. 454.

2. Estate of Poten, 72 Cal. 576, 14 Pac. 209.

3. Estate of Smith, 117 Cal. 505, 49 Pac. 456 (an order directing payment of a preferred claim); Ex parte Orford, 102 Cal. 656, 36 Pac. 928 (an order directing payment of a debt is appealable); Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310 (an order requiring a guardian to pay for the maintenance of a minor).

4. Estate of McKinley, 49 Cal. 152 (an order dismissing a petition to have an administrator to show cause why an allowed claim shall not be paid is appealable).

forced against him in his lifetime by proper action,[5] the term as used in this provision has been given a broad meaning. It has been held to include a demand for attorney's fees presented, allowed and ordered paid as a claim against the estate,[6] and also a demand for collateral inheritance tax, the payment of which is directed as a claim against the estate.[7] The word "claim," it has been said, is applied to a demand against an estate after as well as before it has been allowed, but it is limited to debts and claims which can be allowed, rejected or ordered paid. If the demand is not of this character, orders relating to it are not appealable, even though it be conceded that it is a demand against the estate. A claim by a purchaser at an executor's sale for the return of money paid to the executor, after reversal of an order confirming the sale, is not of this character; and no appeal lies from an order dismissing a petition for an order that the executor return such money.[8] An order vacating the allowance of a claim against an estate is not enumerated in the code and as a consequence is not an appealable order.[9]

Allowance to widow or child.—While an appeal lies from a judgment or order making an allowance to a widow,[10] or against making such allowance, no appeal

5. Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35.

6. Mousmer v. Superior Court, 159 Cal. 663, 115 Pac. 221 (an order directing the payment, out of the assets of the estate, of attorney's fees incurred by an unsuccessful proponent of a will); Estate of Kruger, 123 Cal. 391, 55 Pac. 1056 (fees of attorney of executor); Leach v. Pierce, 93 Cal. 627, 29 Pac. 239 (an order directing payment of fee allowed to attorney appointed to represent minor or nonresident heir is appealable); Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35, explained in In re Stuttmeister, 75 Cal. 346.

7. Cross v. Superior Court, 2 Cal. App. 342, 83 Pac. 815 (the party may take an appeal from an order directing payment of the tax, or from final distribution if the decree should direct a deduction of the amount of the tax).

8. In re Williams Estate, 3 Cal. Unrep. 788, 32 Pac. 241.

9. Kowalsky v. Superior Court, 13 Cal. App. 218, 109 Pac. 158.

10. In re Stevens, 83 Cal. 322, 326, 17 Am. St. Rep. 252, 23 Pac. 379.

lies from an order discontinuing an allowance, as such an order is not equivalent to an order refusing to grant an allowance within the meaning of the code section. If the trial court is without jurisdiction to make such an order, the proper remedy of the party is certiorari.[11]

§ 45. Orders as to Probate of Will and Appointment of Representative or Guardian.—The Code of Civil Procedure provides that an appeal may be taken: "From a judgment or order granting or refusing to grant, revoking or refusing to revoke letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof."[12] Section 1413 of the Code of Civil Procedure relating to the appointment of special administrators provides that no appeal must be allowed from the appointment. In giving effect to both provisions of the code, it would seem that the quoted portion of section 963 relates only to orders appointing general administrators.[13] The provision authorizing an appeal from an order revoking letters of guardianship refers to the guardianship of the person or estate of a minor, or of an insane or incompetent person for which provision is made in chapter 14 of title XI, part III of the Code of Civil Procedure. It does not include an order appointing a guardian ad litem to represent the infant or incompetent person authorized by section 372. No letters of guardianship are issued to a guardian ad litem, but his authority is evidenced by an entry in the minutes of the court appointing him. It follows also that an appeal will not lie from an order appointing a guardian ad litem.[14] Under section 963 an appeal may be taken from an order

11. Estate of Overton, 13 Cal. App. 117, 108 Pac. 1021.

12. Code Civ. Proc., § 963, subd. 3 (in part).

13. In re Carpenter, 73 Cal. 202, 14 Pac. 677 (limiting Estate of Crozier, 65 Cal. 333, 4 Pac. 109).

14. Estate of Hathaway, 111 Cal. 270, 43 Pac. 754.

appointing a guardian,[15] an order denying a petition for letters of administration,[16] an order vacating the appointment of an administrator,[17] or refusing to do so.[18] And as no provision is made therefor, no appeal lies from an order vacating an order substituting a trustee of an estate.[19] The code authorizes an appeal from an order revoking the probate of a will,[20] and also from an order refusing to revoke probate,[1] although prior to 1901 it did not make provision for an appeal from the latter order.[2] An order dismissing a contest after probate is strictly in effect an order refusing to revoke the probate of a will and is appealable as such.[3] But it has been held that an order setting aside a judgment refusing to admit a will to probate is not an appealable order.[4]

As an order refusing the probate of a will and an order appointing an administrator are distinct proceedings, they must be so regarded though in form a single order, and likewise an order revoking such orders must be deemed separate orders for the purpose of appeal. Consequently, though an appeal from that portion of the order revoking

15. Matter of Moss, 120 Cal. 695, 53 Pac. 357; Ex parte Miller, 109 Cal. 643, 42 Pac. 428; In re Get Young, 90 Cal. 77, 27 Pac. 158.

16. Estate of Funkenstein, 170 Cal. 594, 150 Pac. 987; Estate of Graves, 8 Cal. App. 254, 96 Pac. 792.

17. Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

18. Code Civ. Proc., § 963, subd. 3. Formerly the rule was otherwise. Estate of Moore, 68 Cal. 394, 9 Pac. 315; Estate of Keane, 56 Cal. 407; Estate of Montgomery, 55 Cal. 210.

19. In re Moore, 86 Cal. 58, 24 Pac. 816.

20. In re Hathaway, 111 Cal. 270, 43 Pac. 754; Estate of Crozier, 65 Cal. 332, 4 Pac. 109.

1. Estate of Plumb, 177 Cal. 300, 170 Pac. 609; Estate of Baker, 170 Cal. 578, 150 Pac. 989; Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7; Mahoney v. Superior Court, 140 Cal. 513, 74 Pac. 13.

2. Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; Estate of Hathaway, 111 Cal. 270, 43 Pac. 754; Estate of Sbarboro, 70 Cal. 147, 11 Pac. 563 (holding an order dismissing a petition for revocation of probate nonappealable).

3. Estate of Plumb, 177 Cal. 300, 170 Pac. 609; Estate of Baker, 170 Cal. 578, 150 Pac. 989; Mahoney v. Superior Court, 140 Cal. 513, 74 Pac. 13.

4. Peralta v. Castro, 15 Cal. 511; Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

the order denying probate will be dismissed, the appeal from that portion of the order revoking the appointment of the representative will be entertained.[5]

§ 46. Partition, Sale or Conveyance.—The Code of Civil Procedure provides that an appeal may be taken from a judgment or order "against or in favor of directing the partition, sale, or conveyance of real property."[6] This provision clearly authorizes an order of a probate court directing a personal representative to sell the land of his decedent.[7] The fact that the will directs a sale to be made does not make such an order one requiring the personal representative to proceed to execute the will or show cause why he should not be removed, and thereby defeat the right to appeal. Such a contention is frivolous.[8] So, also, an appeal will lie from an order confirming a sale of property under a power of sale in a will and directing a conveyance,[9] from an order directing a resale of property formerly sold,[10] and also from an order of a probate court granting specific performance of a contract of a decedent by directing an executor to execute a conveyance.[11] But an appeal does not lie from an order directing a personal representative to proceed with the sale of property, previously ordered to be sold.[12] The form of the order is not material as affecting the right of appeal, but the question in such case is, What is its legal effect? And because they are in

5. Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066.

6. Estate of Boland, 55 Cal. 310–316.

7. Estate of Lloyd, 175 Cal. 699, 167 Pac. 157; Estate of Bazzuro, 161 Cal. 71, 118 Pac. 434; Estate of Devincenzi, 119 Cal. 498, 51 Pac. 845; Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270.

8. Estate of Lloyd, 175 Cal. 699, 167 Pac. 157.

9. In re Pearsons, 98 Cal. 603, 33 Pac. 451.

10. Estate of Boland, 55 Cal. 310.

11. Estate of Corwin, 61 Cal. 160, followed in Estate of Potter, 141 Cal. 350.

12. Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270; Estate of Martin, 56 Cal. 208.

legal effect orders against directing a sale, an appeal may be taken from an order refusing to hear evidence or confirm a sale,[13] and an order vacating a prior order confirming a sale.[14] But it does not follow from this that an appeal lies from an order refusing to set aside a previous order for the sale of lands.[15]

The word "conveyance" as used in the sections of the code relating to the recordation of written instruments embraces mortgages, and, considering the importance of an order authorizing an executor to mortgage a decedent's land, it is clear that the legislature intended in this code section to use the word in the same broad sense given to it in the statutes referred to. An appeal therefore will lie from an order directing a personal representative to mortgage the land of his decedent.[16]

§ 47. **Accounting and Distribution.**—The Code of Civil Procedure specifically authorizes the taking of an appeal from an order "settling an account of an executor, administrator or guardian."[17] This provision includes an order settling a current account,[18] and under it an appeal may

13. Estate of Leonis, 138 Cal. 194, 71 Pac. 171.

14. Estate of West, 162 Cal. 352, 122 Pac. 953. In referring to this case, Mr. Justice Melvin, in Estate of McCarty, 169 Cal. 708, 147 Pac. 941, stated that the basic principle underlying it was that the order set aside gave the appellant rights which, if properly conferred, were absolute. An order disturbing those rights, particularly the right to a consummation of the sale, was therefore an order against directing a conveyance.

15. Estate of McCarty, 169 Cal. 708, 147 Pac. 941; In the Matter of the Estate of Smith, 51 Cal. 563.

16. In re McConnell, 74 Cal. 217, 15 Pac. 746.

17. Code Civ. Proc., § 963, subd. 3; Estate of Grant, 131 Cal. 426, 429, 63 Pac. 731; Estate of Hickey, 121 Cal. 378, 53 Pac. 818; In re Delaney, 110 Cal. 565, 42 Pac. 981; In re Couts, 87 Cal. 480, 25 Pac. 685; In re Rose, 80 Cal. 166, 22 Pac. 86; In re Bullock, 75 Cal. 415, 17 Pac. 540; In re Sanderson, 74 Cal. 199, 216, 15 Pac. 753 (an order allowing and approving an account except in certain particulars is an order settling an account within the code. Only the clerical duty of conforming the account to the order remains).

18. Estate of Fernandez, 119 Cal. 579, 51 Pac. 851.

be taken from an order purporting to settle an account before it is filed. The fact that such order is imperative does not defeat the right to appeal, as the question of the appealability of an order is to be determined by what it purports to decide, rather than by its actual operative effect.[19]

No appeal, however, can be taken from an order denying a motion, under section 473 of the Code of Civil Procedure, to vacate an order settling an account,[20] or from an order vacating a prior order settling the account of a personal representative.[1] In the later case, when the court again settles the account, the personal representative, if he then feels aggrieved, can appeal from the order settling it.[2]

The case provides also that appeals may be taken from a judgment or order refusing, allowing or directing the distribution or partition of an estate or any part thereof.[3] Under this provision an appeal lies from an order directing a partial distribution of an estate.[4] But no appeal lies from an order vacating a decree of distribution,[5] or refusing to do so,[6] or from an order suspending an order

19. In re Bullock, 75 Cal. 419, 17 Pac. 540.

20. Estate of Spafford, 175 Cal. 52, 165 Pac. 1; Estate of Hickey, 129 Cal. 14, 61 Pac. 475.

1. Estate of Mitchell, 126 Cal. 248, 251, 58 Pac. 549; Estate of Hickey, 121 Cal. 378, 53 Pac. 818; (distinguished in Estate of West, 162 Cal. 352, 122 Pac. 953); In re Rose, 80 Cal. 166, 170, 22 Pac. 86; Estate of Cahalan, 70 Cal. 604; Estate of Dean, 62 Cal. 613; Estate of Dunne, 53 Cal. 631.

2. Estate of Hickey, 121 Cal. 378, 53 Pac. 818. See infra, § 67, as to review on appeal from final judgment.

3. Code Civ. Proc., § 963, subd. 3; Estate of Mitchell, 126 Cal. 248, 251, 58 Pac. 549 (order directing distribution); In re Delaney, 110 Cal. 563, 42 Pac. 981 (order directing distribution); In re Wiard, 83 Cal. 619, 24 Pac. 45 (order directing distribution); Estate of Calahan, 60 Cal. 232 (order directing distribution).

4. Estate of Mitchell, 121 Cal. 391, 53 Pac. 810.

5. Estate of Murphy, 128 Cal. 339, 60 Pac. 930; Estate of Dean, 62 Cal. 613; Estate of Calahan, 60 Cal. 232.

6. In re Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Lutz, 67 Cal. 457, 8 Pac. 39. See supra, § 30.

of final distribution,[7] or from an order requiring a distributee to restore property received under a decree of distribution.[8] Although an order settling an account of an executor and a decree of distribution are made at the same time and are included in one paper under one signature of the judge, either may be appealed from without reference to the other.[9]

IV. AMOUNT IN CONTROVERSY.

§ 48. **In General.**—The right to appeal to the supreme court or to a district court of appeal in actions at law is limited by the constitution to cases in which the demand exclusive of interest amounts to or is in excess of three hundred dollars. Under the constitution of 1849, the supreme court had jurisdiction in all cases when the matter in dispute exceeded two hundred dollars.[10] This provision was amended in 1862. As amended it provided that the supreme court should have appellate jurisdiction in all cases at law where the demand, exclusive of interest, amounted to three hundred dollars.[11]

7. In re Burdick, 112 Cal. 387, 44 Pac. 734.

8. Iversen v. Superior Court, 115 Cal. 27, 46 Pac. 817.

9. In re Delaney, 110 Cal. 565, 42 Pac. 981.

10. Bolton v. Landers, 27 Cal. 104–106; Poland v. Carrigan, 20 Cal. 175; Zabriskie v. Torrey, 20 Cal. 174 (unlike subsequent constitutions, it was required by the constitution of 1849 that the matter in dispute "exceed" two hundred dollars); People ex rel. Morehouse v. Carman, 18 Cal. 693; Simmons v. Brainard, 14 Cal. 278; Dumphy v. Guindon, 13 Cal. 28; Doyle v. Seawall, 12 Cal. 280; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Webb v. Hanson, 2 Cal. 133 (holding that a judgment affirming an order of the court granting a ferry license is not a judgment in a suit for "a tax, toll, impost, or municipal fine" within the meaning of the constitution, and that the appellate court has no jurisdiction if the amount is less than two hundred dollars); Luther v. Ship Apollo, 1 Cal. 15; Myers v. Liening, 1 Cal. Unrep. 78; Earl v. George, 1 Cal. Unrep. 52.

11. Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457; Langan v. Langan, 83 Cal. 618, 23 Pac. 1084 (overruled on another point—see infra, note 15, next section, and infra, § 51, note 20); People v. Perry, 79 Cal. 105, 21 Pac. 423; Oullahan v. Morrissey, 73 Cal. 297,

The present constitution provides that the supreme court shall have jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars; also in all such probate matters as may be provided by law. The district courts of appeal shall have jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars; also, in all cases of forcible and unlawful entry and detainer (except such as arise in justices' courts), in proceedings in insolvency, and in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari and prohibition, usurpation of office, contesting elections and eminent domain, and in such other proceedings as may be provided by law (except cases in which appellate jurisdiction is given to the supreme court).[12]

As the jurisdiction of the appellate courts is fixed by the constitution, it is not competent for the legislature

14 Pac. 864; Holmes v. Warren (Cal.), 9 Pac. 71; Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. 941; Sanborn v. Contra Costa County, 60 Cal. 426; Sweet v. Tice, 45 Cal. 71; Maxfield v. Johnson, 30 Cal. 545; Hopkins v. Cheeseman, 28 Cal. 180 (if the demand is less than three hundred dollars, the supreme court has no jurisdiction either on appeal or writ of error); Santa Monica v. Eckert, 4 Cal. Unrep. 92, 33 Pac. 880; Hackley v. Craig, 2 Cal. Unrep. 289, 3 Pac. 494.

12. Const., art. VI, § 4. Code of Civil Procedure, sections 52, 52a, contain corresponding provisions; Wagner v. Cardinet Fountain Brush Co., 32 Cal. App. 493, 163 Pac. 337; Bartnett v. Hull, 19 Cal. App. 91, 124 Pac. 885; J. Dewing Co. v. Thompson, 19 Cal. App. 85, 124 Pac. 1035; Willow Land Co. v. Goldschmidt, 11 Cal. App. 297, 104 Pac. 841; Hesperia Land & Water Co. v. Gardner, 4 Cal. App. 357, 88 Pac. 286; Cox v. Southern Pacific Co., 2 Cal. App. 248, 83 Pac. 290.

to confer jurisdiction and authorize an appeal in cases in which the demand is less than that specified in the constitution.[13] And if the amount is less than that prescribed, the supreme court has no jurisdiction either on appeal or writ of error.[14]

§ 49. **Cases Subject to Pecuniary Limitations.**—The constitution confers upon the supreme court appellate jurisdiction "in all cases in equity except such as arise in justices' courts." This jurisdiction is not made dependent upon the amount of the demand or the value of the property in controversy. Consequently, appeals in actions for the foreclosure of liens and street assessments may be taken regardless of the amount involved. So, also, as divorce actions are deemed to be equitable in character, orders made after judgment therein which direct the payment of money are appealable without regard to the amount named in the order.[15] The same is true of appeals to a district court of appeal in actions to prevent or abate nuisances. The court has appellate jurisdiction over the whole and every part of the judgment in such an action, and, therefore, an appeal may be taken from that part of the judgment relating to costs, though less than three hundred dollars.[16] The constitution confers appellate jurisdiction in all such probate matters as may be provided by law,[17] and the legislature has authorized appeals in probate matters irrespective of the amount involved.[18]

13. Maxfield v. Johnson, 30 Cal. 545. See supra, § 11.

14. Hopkins v. Cheeseman, 28 Cal. 180, quashing writ of error.

15. Harron v. Harron, 123 Cal. 508, 56 Pac. 334, overruling Langan v. Langan, 83 Cal. 618, and Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101, and holding an order requiring the defendant to pay counsel fees and costs to enable the plaintiff to resist a motion for new trial to be appealable, though the amount is less than three hundred dollars.

16. White v. Gaffney, 1 Cal. App. 715, 82 Pac. 1088. See infra, § 51, as to costs.

17. Const., art. VI, § 4.

18. In re Delaney, 110 Cal. 563, 42 Pac. 981 (order settling an account of an executor); Ex parte

The amount of the demand or the value of the property in controversy forms an element in determining appellate jurisdiction only in "cases at law,"[19] and, by virtue of the express terms of the constitution, only in such cases at law which do not involve title or possession of real estate,[20] and which do not involve the legality of any tax, impost, assessment, toll or municipal fine.[1] An action in the nature of quo warranto in which a fine is prayed for usurpation of office is a "case at law" within the rule, and is within the jurisdiction of the appellate court where the amount of the demand, exclusive of interest, is three hundred dollars.[2] On the other hand, there is no demand for a sum of money in a contempt proceeding, and such a demand, if made, would be without avail. Therefore, though the amount of the fine imposed is in excess of three hundred dollars, the right to appeal from the judgment cannot be predicated upon this section of the constitution.[3] Again, the jurisdiction of an appeal from a judgment of a superior court rendered in a certiorari case does not depend upon the amount in controversy. On

Orford, 102 Cal. 656, 36 Pac. 928 (where an appeal was taken from an order directing the payment of a claim which was less than three hundred dollars).

19. Harron v. Harron, 123 Cal. 508, 56 Pac. 334. See COURTS, for construction of the term "case at law."

20. Southern California Ry. Co. v. Superior Court, 127 Cal. 417, 421, 59 Pac. 789; Baker v. Southern California Ry. Co., 110 Cal. 455, 42 Pac. 975, 114 Cal. 501, 46 Pac. 604; Doherty v. Thayer, 31 Cal. 140; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

1. Votan v. Reese, 20 Cal. 89; Dumphy v. Guindon, 13 Cal. 28; Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

2. People v. Perry, 79 Cal. 105, 21 Pac. 423. See People v. Bingham, 82 Cal. 240, 22 Pac. 1039, applying the rule to jurisdiction of the superior court. See QUO WARRANTO.

3. Sanchez v. Newman, 70 Cal. 210, 11 Pac. 645; Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414 (overruling People v. O'Neil, 47 Cal. 109. The appeal is not within the jurisdiction of the appellate court as a criminal case either, as appellate jurisdiction in such cases is limited to proceedings prosecuted by indictment or information. The remedy of the party is by certiorari or habeas corpus). See CONTEMPT.

such appeal the court does not review the merits of the case. While, in determining whether the inferior court, board or officer had jurisdiction, it may or may not have occasion to look to the amount in dispute, it does not do so for the purpose of adjudicating the amount, or any question involving the right of either party to a judgment on the merits.[4]

§ 50. Determination of Amount and Test.—There is a clear distinction between the term "matter in dispute" in the constitution of 1849 and the term "demand" as found in the amendment of 1862 and subsequent constitutions. The term "matter in dispute" has been defined to mean the subject of litigation.[5] This is not necessarily the amount demanded in the complaint. If the verdict be for the defendant, and the plaintiff appeal, it is sufficient if the amount demanded in the complaint exceeds two hundred dollars.[6] But if the verdict be for the plaintiff, and he appeal, the matter in dispute is the difference between the amount demanded in the complaint and the amount of the verdict.[7] Upon the same principle, where an appeal is taken by a defendant from a judgment against him, the amount in dispute is the amount of the judgment, unless he has interposed a counterclaim, in which case the amount in dispute is the difference between the amount claimed and the amount of the judgment.[8]

4. Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366, overruling Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113; Winter v. Fitzpatrick, 35 Cal. 269, overruling People v. Carman, 18 Cal. 693. See CERTIORARI.

5. Dumphy v. Guindon, 13 Cal. 28.

6. Skillman v. Lachman, 23 Cal. 198; Votan v. Reese, 20 Cal. 89; Gillespie v. Benson, 18 Cal. 409 (where the plaintiff appeals from a judgment against him on an offset, the amount in dispute is the amount claimed by the complaint); Simmons v. Brainard, 14 Cal. 278 (the amount of the offset is not to be considered where the plaintiff appeals).

7. Skillman v. Lachman, 23 Cal. 198; Votan v. Reese, 20 Cal. 89.

8. Skillman v. Lachman, 23 Cal 198; Crandall v. Blen, 15 Cal. 407

If interest on a demand be claimed, the interest due should be added in estimating the "matter in dispute,"[9] but costs being merely incidental to the action, constitute no part of the matter in dispute.[10] The same is true of any amount adjudged as percentage.[11] The "demand," on the other hand, is the amount claimed in the complaint, exclusive of interest and costs. Interest is not to be considered in this connection because expressly excluded by the constitution; nor costs because they are merely incidental to the action.[12]

The jurisdiction is in no way dependent upon the counterclaim set up by the defendant.[13] Nor, it would seem, is the jurisdiction affected by an admission in the answer of a portion of the demand which reduces the amount in dispute to less than three hundred dollars. At all events, where the amount of the demand is put in issue by answer, the amount is not reduced so as to defeat the jurisdiction of the appellate court by stipulations at the trial or admissions made in appellant's brief that a portion of the demand was due the plaintiff.[14] So,

(no appeal lay from an order denying a motion by a defendant to setoff a judgment in his favor for less than two hundred dollars against a judgment against him in excess of that amount).

9. Skillman v. Lachman, 23 Cal. 198; Malson v. Vaughn, 23 Cal. 61.

10. Bolton v. Landers (No. 2), 27 Cal. 104–106; Zabriskie v. Torrey, 20 Cal. 174; Votan v. Reese, 20 Cal. 89; Dumphy v. Guindon, 13 Cal. 28, overruling Gordon v. Ross, 2 Cal. 156. Compare Doyle v. Seawall, 12 Cal. 280, where the court said there is no showing that the costs swelled the matter in dispute to more than two hundred dollars.

11. Zabriskie v. Torrey, 20 Cal. 174, where judgment was rendered for the amount claimed, and costs, and ten dollars percentage.

12. Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457; Maxfield v. Johnson, 30 Cal. 545; Williamson v. Monroe, 28 Cal. App. 367, 152 Pac. 567.

13. Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126; Maxfield v. Johnson, 30 Cal. 545.

14. Morgan v. County of San Diego, 3 Cal. App. 455, 86 Pac. 720. The court says that the jurisdiction of the superior court is to be determined by the prayer of the complaint; and it being for more than three hundred dollars and "there being no admission in the answer that any portion of the amount claimed in the complaint is due," but, on the contrary, a denial that anything is due, there can be no question that the supreme court has jurisdiction.

also, the amount of the judgment rendered is immaterial as affecting appellate jurisdiction. If the plaintiff sues to recover a demand for five hundred dollars and recovers a judgment for three hundred dollars, his demand does not thereby become converted into a demand for two hundred dollars, for the purposes of an appeal, should he be dissatisfied with the judgment and desire to appeal.[15] And when the defendant appeals, the right of appeal is not determined by the amount of the judgment against him, but by the amount demanded in the complaint.[16]

Therefore, under the later constitutions, the sole test of jurisdiction on appeal from a judgment rendered in an action for money is the ad damnum clause in the complaint,[17] provided, it seems, that it does not appear from the record that the amount demanded in the prayer is feigned and has no support in the allegations upon which it is founded.[18] In other words, if the amount sued for

15. Solomon v. Reese, 34 Cal. 28 (overruling dictum in Votan v. Reese, 20 Cal. 89). The case of Votan v. Reese, however, was decided under the constitution of 1849. It is clearly distinguishable on that ground, and was so distinguished in Dashiel v. Slingerland, 60 Cal. 653.

16. Rubio Cañon Land & Water Assn. v. Everett, 154 Cal. 29, 96 Pac. 811; People v. Madden, 134 Cal. 611, 66 Pac. 874 (where the amount demanded was over three hundred dollars, but the judgment was rendered against the defendant for eighteen dollars and seventy-five cents); Dashiell v. Slingerland, 60 Cal. 653.

17. Henigan v. Ervin, 110 Cal. 37; Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795; Lord v. Goldburg, 81 Cal. 596, 22 Pac. 1126; Dashiell v. Slingerland, 60 Cal. 653; Solomon v. Reese, 34 Cal. 28; Maxfield v. Johnson, 30 Cal. 545; Wagner v. Cardinet Fountain Brush Co., 32 Cal. App. 493, 163 Pac. 337; Williamson v. Monroe, 28 Cal. App. 367, 152 Pac. 567; Erving v. Napa Valley Brewing Co., 17 Cal. App. 367, 119 Pac. 940; Morgan v. San Diego, 3 Cal. App. 454, 86 Pac. 720. See Tyler v. Connolly, 65 Cal. 28, 30, 2 Pac. 414, where the court says: "The demand made appears in the pleadings—either in the complaint or answer."

18. Lehnhardt v. Jennings, 119 Cal. 192, 198, 48 Pac. 56, 51 Pac. 195 (an action to recover back fees paid for official services in levying an execution amounting to less than three hundred dollars, and for two hundred dollars in addition, all of which the defendant agreed to return if the demand was not legal, is not within the jurisdiction of the superior court, where it is not stated in the com-

is large enough to give the superior court jurisdiction, the supreme court or a district court of appeal has jurisdiction on appeal, and this is so whether the appeal be taken by the plaintiff or by the defendant.[19]

§ 51. On Appeal from Orders for Attorney's Fees, Costs and Services.—In accordance with the test just laid down, the jurisdiction to entertain an appeal from a special order made after final judgment is not dependent upon the amount of money named in the order, but, if the order is made in a case at law, upon the amount claimed in the complaint, exclusive of interest.[20] An appeal, therefore, may be taken from an order of a superior court after judgment relating to costs of suit, though the amount thereof is less than three hundred dollars.[1] This

plaint upon what pretext the plaintiff made such additional demand. This opinion was rendered in department, and subsequently, after a suggestion of diminution of record, a hearing in Bank was ordered, not, says the commissioner, because the conclusion was erroneous, but because the added matter showed a case of which the court below had jurisdiction).

19. Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126; Morgan v. County of San Diego, 3 Cal. App. 454, 86 Pac. 720.

20. Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360; Southern California Ry. Co. v. Superior Court, 127 Cal. 417, 59 Pac. 789 (overruling Oullahan v. Morrissey, 73 Cal. 297; Perry v. Quackenbush, 105 Cal. 299, 311); Harron v. Harron, 123 Cal. 508, 56 Pac. 334 (overruling Fairbanks v. Lampken, 99 Cal. 429, 34 Pac. 101; Langan v. Langan, 83 Cal. 618, 23 Pac. 1084); Linforth v. San Francisco Gas & Elec. Co., 9 Cal. App. 434, 99 Pac. 716. See Sellick v. De Carlow, 95 Cal. 644, 30 Pac. 795, not deciding the point. See, also, the following cases in effect overruled by the cases above cited: Quitzow v. Perrin, 120 Cal. 255, 52 Pac. 632 (explained in Engel v. Ehret, 21 Cal. App. 112, 130 Pac. 1197); Ertle v. Placer Co., 5 Cal. Unrep. 302, 44 Pac. 229; Langan v. Langan, 86 Cal. 132, 24 Pac. 852; Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. 941.

1. See cases cited supra, note 20, this section; and Meyer v. Perkins, 20 Cal. App. 661, 666, 130 Pac. 206, 208, on rehearing; Linforth v. San Francisco Gas & E. Co., 9 Cal. App. 434, 99 Pac. 716; Caffey v. Mann, 3 Cal. App. 124, 84 Pac. 424. The following cases have been overruled by later decisions: Foley v. California Horseshoe Co., 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; Perry v. Quackenbush, 105 Cal. 299, 310, 38 Pac. 740; Ertle v. Placer Co., 5 Cal. Unrep. 302, 44 Pac. 229; Randall v. Duff,

rule is equally applicable to interlocutory orders. The rule established by the more recent decisions is that in all cases, legal or equitable, where the courts of review have appellate jurisdiction of the matter brought in controversy in the lower court, the appealability of an order made before or after judgment is not controlled or affected by the amount of such order.[2] There is an apparent exception to this rule, where that portion of the judgment or order appealed from is rendered in an auxiliary proceeding in favor of or against a third person who is not, strictly speaking, a party to the action. For example, where in an action against an infant, the court orders the plaintiff, on whose application a guardian ad litem is appointed, to pay such guardian a fixed amount as services. Such order, though made a part of the judgment, is not, properly speaking, a portion of the judgment between the parties. It is in the nature of an independent judgment in favor of the guardian against the plaintiff, and jurisdiction is not dependent upon the original demand in the suit but upon the amount of the order. If the order is less than three hundred dollars, neither the supreme court nor the district court of appeal has jurisdiction thereof.[3]

107 Cal. 33, 40 Pac. 20; Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101. See Meeker v. Harris, 23 Cal. 285, decided under the constitution of 1849, and holding that an order refusing to issue an execution for costs is appealable to the supreme court when the amount of costs exceeds two hundred dollars.

2. Sierra Union Water & Min. Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038.

3. Aronson v. Levison, 148 Cal. 364, 83 Pac. 154 (per Shaw, J., Beatty, C. J., Angellotti J., and Henshaw, J. It was held by Van Dyke, J., McFarland, J., and Lorigan, J., in the opinion concurred in, that the compensation of the guardian ad litem was in the nature of expenses or costs, and an incident to the action, forming no part of the cause of action or defense thereto, and that the court had no jurisdiction as the appeal was from a portion of the judgment itself and for costs or expenses of the action not amounting to three hundred dollars).

D. RIGHT OF REVIEW AND PARTIES.

I. PERSONS ENTITLED TO APPEAL.

§ 52. Necessity That Appellant be a "Party."—The code provides as follows:

"Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent."[4]

Under this code section, a person to be entitled to appeal must be a "party,"[5] or a person in privity with a party;[6] and he must be "aggrieved."[7] The word "party" includes any person who is "a party to the action or proceeding,"[8] or who is a "party to the record."[9] One who is not a party to the record cannot appeal in his own name. One not a party to an action or proceeding may sometimes appeal, but in some way his interest must be made to appear in the record, and he must be a party to the ruling appealed from.[10]

The term "party" is not confined to persons who were original parties when the action or proceeding was first

4. Code Civ. Proc., § 938; Klauber v. San Diego St. Car Co., 98 Cal. 105, 109, 32 Pac. 876; Coburn v. Smart, 53 Cal. 742.

5. Estate of Kruger, 143 Cal. 141, 76 Pac. 891 (holding an attorney is not a party and cannot appeal from an order settling an executor's account); Dunphy v. The Potrero Co., 2 Cal. Unrep. 408, 4 Pac. 1171. And see cases cited infra.

6. Estate of Callaghan, 119 Cal. 571, 577, 39 L. R. A. 689, 51 Pac. 860 (where Temple, J., specially concurring, says that no one can appeal from a judgment except the parties to it, or those in privity with the parties).

7. See infra, § 57.

8. Estate of McDermott, 127 Cal. 450, 59 Pac. 783 (a party must have been a party to the action or proceeding in the court below); Senter v. De Bernal, 38 Cal. 637 (by "any party" is to be understood, any person who is a party to the action); Montgomery v. Leavenworth, 2 Cal. 57 (one not a party to the cause cannot appeal).

9. Elliott v. Superior Court, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109; Estate of Crooks, 125 Cal. 459, 58 Pac. 89; People v. Grant, 45 Cal. 97; Jones v. Thompson, 12 Cal. 191. And cases cited infra.

10. Estate of Crooks, 125 Cal. 459, 58 Pac. 89.

instituted, but it embraces, also, parties who are subsequently brought into the action.[11]

Becoming "party to the record."—A person not a party to an action whose rights or interests are injuriously affected by a judgment or appealable order cannot appeal directly therefrom.[12] However, he may make himself a party to the record by moving to set aside such judgment or order and then appeal from the order denying his motion.[13] Such proceeding can scarcely be said to make him a party to the action, but it does make him party to the record, and, as such, entitled to appeal. Indeed, unless he be permitted to make such motion and take an appeal from an adverse order thereon, he would be without remedy.[14]

One may become a party to the record in other ways also; for example, by an order to show cause. Thus, where a party holding money of an insolvent bank is upon show-cause proceedings directed to pay the money to a receiver, he is made a party to the record so far as such collateral proceeding is concerned, by the order to show cause, and is entitled to appeal.[15] So, also, a sheriff, though not a party to the action, may appeal from an order requiring him to make a sale, without an indemnity bond, of property held by him under execution. The order in question has the effect of a judgment against him in a collateral proceeding, and the sheriff is made a

11. Estate of McDermott, 127 Cal. 450, 59 Pac. 783; Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

12. See cases cited supra.

13. Tattenham v. Superior Court, 155 Cal. 205, 100 Pac. 248; Delmas v. Superior Court, 144 Cal. 510, 77 Pac. 1132; Elliott v. Superior Court, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109; Credits Com. Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48; Green v. Hebbard, 95 Cal. 39, 30 Pac. 202; Malone v. Big Flat Gravel M. Co., 93 Cal. 384, 28 Pac. 1063 (motion by grantee of original defendant); People v. Grant, 45 Cal. 97; Tingley v. Superior Court, 8 Cal. App. 47, 96 Pac. 20. See supra, §§ 31, 32.

14. People v. Grant, 45 Cal. 97.

15. Anglo-California Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803.

party to the record by the order to show cause.[16] However, strangers to an action do not become parties to the record so as to entitle them to appeal directly from a judgment or order, by reason of their being parties to a contract embodied in an order of court.[17] If the record shows a person to be a party aggrieved, he may appeal although he had not previously appeared in the case.[18]

§ 53. Rule Applied.—An attorney of a party is not a party to the action and cannot, as a rule, appeal in his own name.[19] A surety merely as such has no right to appeal from a judgment against the principal, if not made a party to the record, either originally or by intervention.[20] So, also, since under the code a guardian must prosecute or defend actions in the name of his ward, and is not himself a party to the action, it seems that he is not authorized to appeal in his own name.[1]

Interveners and persons denied intervention.—By intervening in an action, the intervener becomes a party thereto and is entitled to appeal from the final judgment in the action if aggrieved thereby.[2] But an intervention in a special proceeding collateral to the main action does not make the intervener a party to the record so as to entitle him to appeal directly from a judgment or order

16. Cline v. Superior Court, 35 Cal. App. 150, 169 Pac. 453.

17. Elliott v. Superior Court, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109.

18. In re Meade's Estate, 5 Cal. Unrep. 678, 49 Pac. 5.

19. Norton v. Walsh, 94 Cal. 564, 29 Pac. 1109. See ATTORNEYS AT LAW.

20. Estate of McDermott, 127 Cal. 450, 59 Pac. 783 (holding that there can be no intervention after trial and judgment); Donovan v. Donovan, 223 Mass. 6, 111 N. E. 607 (following Estate of McDermott, supra). See infra, this section, And see SURETYSHIP.

1. Estate of Callaghan, 119 Cal. 571, 577, 39 L. R. A. 689, 51 Pac. 860 (per Temple, J., specially concurring, explaining In re Rose, 66 Cal. 241, 5 Pac. 220, on the ground that the question was not raised therein). See GUARDIAN AND WARD.

2. People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399, 773; Thorpe v. North Moneta Garden L. W. Co., 12 Cal. App. 186, 106 Pac. 1107 (dismissing appeal because intervener was not aggrieved by a judgment against defendant).

in the action itself.[3] There can be no intervention after trial and judgment, and an order allowing intervention at such time has no significance whatever as affecting the right of appeal.[4]

Whether one who has been denied permission to intervene in an action is a party so as to enable him to appeal from a final judgment therein, is uncertain. It has been held, where a party claiming to be the owner of lands condemned for public purposes was denied permission to intervene in the condemnation proceedings, that the applicant was not a party to the action because his suit to be made a party was rejected. And it was also held, since the judgment was not against him, and he was neither a party nor a privy to it, that he was not injured by it.[5] In another case, which was an action against the principal in an undertaking, it was held that the sureties, by moving before the trial to be permitted to intervene in an action, on being refused, and by excepting to the action of the court, became parties to the record in a technical sense, entitling them to appeal; and they were also aggrieved by the judgment against the principal, as it concluded them as to their liability as sureties on the undertaking given in his behalf.[6]

Purchasers at judicial and probate sales.—A purchaser at a sale under a decree in equity thereby becomes a quasi party to the suit so as to authorize him to appeal from an order confirming the sale;[7] and a similar rule

3. Elliott v. Superior Court, 144 Cal. 501, 507, 103 Am. St. Rep. 102, 77 Pac. 1109.

4. Estate of McDermott, 127 Cal. 450, 59 Pac. 783.

5. People v. Pfeiffer, 59 Cal. 89 (cited with approval in Dollenmeyer v. Pryor, 150 Cal. 1, 87 Pac. 616, as supporting the applicant's right to appeal from the order denying him permission to intervene).

6. Coburn v. Smart, 53 Cal. 742, where the applicant appealed from the order denying his motion made at the beginning of the trial to be permitted to intervene and from the final judgment. The court did not, however, pass on the right to appeal from the order.

7. Hammond v. Cailleaud, 111 Cal. 206, 214 (following Boggs v. Fowler, 16 Cal. 559–567, 76 Am. Dec. 561). See Estate of Bradley,

applies to the purchaser upon a resale in probate under a power of sale contained in a will.[8] By his act of purchase under a probate sale he submits himself to the jurisdiction of the court in that proceeding, and is entitled to apply for such relief as the facts of the case may justify. He has a right to file objections to a confirmation of a sale by the court, and is a party aggrieved by the order of confirmation, as the code gives the right of appeal to any party aggrieved by the action of the court, whether he be interested in the estate or not.[9]

§ 54. **Interest in Subject Matter of Suit.**—It is a fundamental principle that no one can prosecute a suit who has no interest, either individually or in a representative capacity, in the subject matter in dispute. Those only can appeal whose interests are affected by the judgment or decree appealed from.[10] If a party has no interest

168 Cal. 655, 144 Pac. 136 (holding that an order confirming the sale to one other than the purchaser is in effect a refusal to confirm the sale to the latter, though there is a question as to whether he has so connected himself with the bid of the former that he can appeal therefrom), and Dunn v. Dunn, 137 Cal. 51, 69 Pac. 847 (action to enjoin sale which would cloud plaintiff's title).

8. Estate of Boland, 55 Cal. 310–316.

9. In re Pearsons, 98 Cal. 603, 33 Pac. 451.

10. Estate of Marshall, 176 Cal. 784, 169 Pac. 672 (a party who has not attempted to establish his kinship to a decedent is not entitled to appeal from a decree establishing the kinship of the respondent); Estate of Callaghan, 119 Cal. 571, 577, 39 L. R. A. 689, 51 Pac. 860 (per Temple, J., specially concurring, saying: "And even as to parties, the record must show that their interests are or may be affected by the judgment"); In re Blythe, 108 Cal. 124, 41 Pac. 33; Estate of Griest, 76 Cal. 497, 18 Pac. 654 (holding that the heirs of an insured have no interest in insurance money willed to the surviving spouse, and that an order directing distribution according to the terms of the will would be affirmed on an appeal by the heirs); Order of Mutual Companions v. Griest, 76 Cal. 497, 18 Pac. 654 (the heirs of a former wife of an insured are not aggrieved by an order as to the disposition of the insurance money where such wife was not nominated as beneficiary and was not entitled to the money); People v. Pfeiffer, 59 Cal. 89. See Becker v. Nye, 8 Cal. App. 129, 96 Pac. 333 (holding the state is interested in an order fixing collateral inheritance tax).

in the property in dispute, he cannot be aggrieved by any disposition the court may make of the property, even where the court gives it to the wrong party, and an appeal taken by him will be dismissed.[11]

Where findings as to noninterest are not attacked.—The general rule above stated applies where the trial court finds that a party has no interest in the subject matter, and such party appeals without attacking the finding because unsustained by the evidence. In such case the findings are conclusive upon the appellate court as to the appellant's noninterest, and the appeal will be dismissed.[12] Thus, one suing as stockholder cannot appeal from the final judgment in the action where the court finds that he never was a stockholder, and this finding is not attacked.[13] And an alleged heir who does not attack a finding that he is neither an heir of the testator nor related to him cannot appeal from a decree in a proceeding to establish heirship, or a decree of distribution, since in such case if there is no kinship in the appellant, he cannot be aggrieved.[14]

Receivers.—A receiver being a mere servant or agent of the court has no such interest in the action as would

11. In the Matter of Siering, 90 Cal. 207, 27 Pac. 204; Order of Mutual Companions v. Griest, 76 Cal. 497, 18 Pac. 654.

12. Estate of Hughson, 173 Cal. 448, 454, 160 Pac. 548; Estate of Walden, 168 Cal. 759, 145 Pac. 100; Estate of Fleming, 162 Cal. 524, 123 Pac. 284; Estate of Piper, 147 Cal. 606, 82 Pac. 246 (where rights depend upon common property and finding is that the property is separate); Foster v. Bowles, 138 Cal. 449, 71 Pac. 495; Williams v. Savings & Loan Society, 133 Cal. 360, 65 Pac. 822; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Flannigan v. Towle, 8 Cal. App. 229, 96 Pac. 507; In re Antoldi's Estate, 7 Cal. Unrep. 211, 81 Pac. 278 (a will contestant who does not attack a finding that he has no interest cannot appeal from an order denying a new trial); Baker v. Varney, 6 Cal. Unrep. 376, 59 Pac. 778 (opinion in department. For opinion in Bank, see 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100).

13. Williams v. Savings & Loan Society, 133 Cal. 360, 65 Pac. 822.

14. Estate of Walden, 168 Cal. 759, 145 Pac. 100; Estate of Fleming, 162 Cal. 524, 123 Pac. 284; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522. See Estate of Walker, 148 Cal. 162, 82 Pac. 770 (not reviewing decree of distribution because of finding).

entitle him to appeal from an order discharging him, even if such order were appealable. He has an interest, however, in an order undertaking to settle his accounts and fix his compensation.[15]

§ 55. **Assignment and Disclaimer of Interest.**—The rule that an appellant must have an interest in the subject matter of the suit applies also where he at one time had an interest but assigned or relinquished his claim. A party defendant who has assigned all his interest in the subject of the action before suit brought has no such interest as entitles him to appeal from the judgment therein, where he has asked for no relief in his own behalf and no judgment for costs or otherwise is rendered against him.[16] But where a judgment is rendered against him, the rule is otherwise,[17] for if the appellant had no interest, he should not have been made a party, and no judgment should have been rendered against him.[18]

Effect of disclaimer of interest.—In actions relating to real property, a defendant who disclaims all interest in the property cannot appeal from a judgment affecting the property only.[19] Thus, a defendant in an ejectment suit

15. Edwards v. Western Land & Power Co., 27 Cal. App. 724, 151 Pac. 16. See RECEIVERS.

16. Deiter v. Kiser, 162 Cal. 315, 122 Cal. 469 (the mere fact that the defendant asks that the relief be granted which his codefendant asks in his cross-complaint does not give him an interest entitling him to appeal); Ridgley v. Abbott Quicksilver Min. Co., 7 Cal. Unrep. 200, 79 Pac. 833; Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal. App. 509, 170 Pac. 631.

17. Rubio Canon Land & Water Co. v. Everett, 154 Cal. 29, 96 Pac. 811 (appeal from a judgment establishing an easement on defendant's land and awarding money damages for injuries thereto); Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 Pac. 724; Ricketson v. Compton, 23 Cal. 636.

18. Ricketson v. Compton, 23 Cal. 636, 649 (in an action to foreclose a mortgage, a person made a party because he has or claims to have some interest in the premises adverse to the plaintiffs may appeal from a judgment foreclosing his equity of redemption).

19. People v. Wilson, 26 Cal. 127; Mono County Irr. Co. v. State, 32 Cal. App. 184, 167 Pac. 199 (citing authorities from other ju-

who in his pleadings disclaimed any right or title to the land in question or to its possession cannot appeal and carry on the litigation for the purpose of showing that some third person not a party to the suit had a better title than the plaintiff. He stands in no better position than any stranger to the controversy.[20] So, also, in an eminent domain proceeding against the state, it cannot appeal where it denied title to the premises, though the trial court found against its denial and decreed condemnation of the land. No personal judgment having been rendered against the state, to review the questions presented after its admission would be to consider mere abstract propositions of law.[1] The rule is applicable also where a party upon the trial admits his lack of interest, as where a plaintiff in an action to quiet title to several tracts of land admits on the trial that he has no interest in the tracts.[2]

A different rule obtains with reference to appeals from interlocutory orders in personal actions. Hence, where, upon the plaintiff's showing that a defendant is a necessary party, the defendant files a verified pleading stating that in the transaction complained of he was acting merely as agent for another, it has been held that he does not thereby deprive himself of the right to appeal from an interlocutory order in the action, prior to a verdict or decision.[3]

§ 56. Necessity That Appellant be Aggrieved.—The appellant must be "aggrieved" by the judgment or order appealed from.[4] If not aggrieved, he has no reason for

risdictions including Brigham City v. Toltec Ranch Co., 101 Fed. 85, 41 C. C. A. 222).

20. Brigham City v. Toltec Ranch Co., 101 Fed. 85, 41 C. C. A. 222.

1. Mono County Irr. Co. v. State, 32 Cal. App. 184, 167 Pac. 199. See Mono County Irr. Co. v. State, 31 Cal. App. 719, 162 Pac. 641 (holding on motion to dismiss that the state was an aggrieved party).

2. Flannigan v. Towle, 8 Cal. App. 229, 96 Pac. 507.

3. Davila v. Heath, 13 Cal. App. 370, 109 Pac. 893.

4. Custis v. Gehele, 177 Cal. 455, 170 Pac. 1109 (a plaintiff suing for

taking an appeal, and his appeal will be dismissed.[5] In an early case a test as to who is a party aggrieved was held to be: "Would the party have had the thing if the erroneous judgment had not been given? If the answer be yea, then the person is the 'party aggrieved.' But his right to the thing must be the immediate, and not the remote, consequence of the judgment, had it been differently given."[6] But this test, however satisfactory to the case under consideration, by no means affords a complete definition of the phrase "party aggrieved." The better rule is that any person having an interest recognized by law in the subject matter, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal.[7] The difference

use of certain water who obtains a judgment in his favor for all water claimed by him is not aggrieved by a provision in the judgment awarding the defendant the excess); People v. Union Bldg. & L. Assn., 127 Cal. 400, 58 Pac. 822, 59 Pac. 692 (receiver); In re Blythe, 103 Cal. 350, 37 Pac. 392; Norton v. Walsh, 94 Cal. 564, 29 Pac. 1109 (judgment in action to quiet title); Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383; Rankin v. Central Pacific R. R. Co., 73 Cal. 96, 15 Pac. 57; People v. Pfeiffer, 59 Cal. 89; Kraemer v. Revalk, 8 Cal. 74 (husband as party aggrieved where homestead is involved); Ridgley v. Abbott Quicksilver Min. Co., 7 Cal. Unrep. 200, 79 Pac. 833; Burnett v. Tolles, 1 Cal. Unrep. 519; Mono County Irr. Co. v. State, 32 Cal. App. 184, 167 Pac. 199; Winsor Pottery Wks. v. Superior Court, 13 Cal. App. 360, 109 Pac. 843 (holding an alleged owner of land is a party aggrieved by an order appointing a receiver of a dissolved corporation for the purpose of recovering the land claimed by him). And cases cited infra.

5. Youle v. Thomas, 146 Cal. 537, 80 Pac. 714 (intervener); Estate v. Crooks, 125 Cal. 459, 58 Pac. 89 (appeal from decree of distribution by mortgagee of heir); Estate of Williams, 122 Cal. 76, 54 Pac. 386; Rankin v. Central Pacific R. R. Co., 73 Cal. 96, 15 Pac. 57; Scotland v. East Branch Min. Co., 56 Cal. 625; Miller v. Bate, 56 Cal. 135; Bates v. Ryberg, 40 Cal. 463; In re Antoldi's Estate, 7 Cal. Unrep. 211, 81 Pac. 278.

6. Adams v. Woods, 8 Cal. 306–322. See Schino v. Cinquini, 7 Cal. App. 244, 94 Pac. 83 (speaking of this rule as a "simple and terse test").

7. Estate of Colton, 164 Cal. 1, 127 Pac. 643; People v. Pfeiffer, 59 Cal. 89 (where the court says: "A party aggrieved means a party to the action, or one prejudiced by the judgment"); Pacific Power Co. v. State, 31 Cal. App. 719, 162 Pac. 641; Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538 ("a party is aggrieved

between these tests is illustrated in a late case in which the parties interested in an estate entered into an agreement providing for distribution of the estate after payment of debts and costs of distribution, and one of the parties in violation of the agreement obtained a decree of partial distribution. Other parties claiming under the agreement are aggrieved by the decree, as their interests are liable to suffer detriment by a distribution before payment of debts, and may appeal, although if the text first stated were followed, they would be denied an appeal because they would not have received the property distributed to the respondent if the decree had not been made.[8]

The injury sustained by the appellant must ordinarily be an injury of a substantial nature,[9] and the appellant must be aggrieved as a party and not collaterally.[10] But it is not necessary that some action be taken on the judgment or order and that actual injury thereunder be done before an appeal can be taken. Indeed, it is to prevent just such consequences that appeals are taken.[11]

§ 57. Party "Against" Whom Judgment is Rendered.— A party against whom a judgment or order is entered is a party aggrieved thereby.[12] Clearly, a party is not aggrieved by, and cannot appeal from, a judgment in his favor,[13] or from an order granting an application made

by a judgment or decree when it operates upon his rights of property, or bears directly upon his interest").

8. Estate of Colton, 164 Cal. 1, 127 Pac. 643.

9. Schino v. Cinquini, 7 Cal. App. 244, 94 Pac. 83.

10. Donovan v. Donovan, 223 Mass. 7, 111 N. E. 607. See supra, § 52.

11. Ely v. Frisbie, 17 Cal. 250 (an appeal may be taken immediately from an order directing the issuance of an injunction. The party need not await the issuance of the injunction).

12. Ely v. Frisbie, 17 Cal. 250.

13. In re Estate of Funkenstein, 170 Cal. 594, 150 Pac. 987; United Railroads v. Colgan, 153 Cal. 53, 94 Pac. 245 (where practically an appeal is by a party whose sole complaint is that the judgment gives him more than he is entitled to, the appeal will be dismissed); Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400; People v. Central Pacific R. R. Co.,

by himself,[14] such, for example, as a judgment of nonsuit rendered on his own motion.[15] Moreover, a party named as defendant in the complaint is not aggrieved by a judgment against his codefendants in which he is not mentioned,[16] or by a judgment denying relief against a codefendant.[17]

It is not necessary, however, that the judgment be actually against the appellant, in order that he be aggrieved thereby. For instance, a party entitled to a judgment without reservations is necessarily injured and aggrieved by any reservations rendering a judgment in his favor a nullity, and he may appeal therefrom.[18] Again, where a court finds in accordance with an answer and dismisses an action but refuses to direct that the dismissal is a bar to another suit as prayed for by the defendant, the defendant is aggrieved by such refusal of the court.[19]

Special statutory proceeding to establish status of newspaper.—A special proceeding is provided by the code, whereby a newspaper may have its standing as "a newspaper of general circulation," ascertained and established.[20] In such a proceeding, it has recently been held by the supreme court that the public has an interest, although not a pecuniary one, and that the statute

76 Cal. 29, 43, 18 Pac. 90; Central Pacific R. R. Co. v. Creed, 70 Cal. 497, 11 Pac. 772; People v. Wilson, 26 Cal. 127.

14. Estate of Radovich, 74 Cal. 536, 5 Am. St. Rep. 466, 16 Pac. 321; Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060.

15. Sleeper v. Kelly, 22 Cal. 456; Imley v. Beard, 6 Cal. 666.

16. Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083; Scotland v. East Branch Min. Co., 56 Cal. 625; Hibernia Savings & Loan Soc. v. Ordway, 38 Cal. 679 (where a defendant appealed from a judgment against his codefendant).

17. Patten & Davis Lumber Co. v. Inman, 40 Cal. App. 111, 180 Pac. 26 (a defendant whose only defense was that he was acting as agent of his codefendant is not aggrieved by a ruling granting his alleged principal's motion for nonsuit).

18. Quint v. McMullen, 103 Cal. 381, 37 Pac. 381 (on the authority of People v. Gold Run D. & M. Co., 66 Cal. 155, 56 Am. Rep. 80, 4 Pac. 1152).

19. Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120.

20. Pol. Code, §§ 4458–4462.

authorizes any person to appear and contest the status of the newspaper or to move to vacate the judgment, whether a party to the proceeding or not. Furthermore, one who appears and contests the application must, for the purposes of appeal, be regarded as "aggrieved" by a judgment for the publisher, and it is not prescribed that the contestant shall have any pecuniary interest in the proceeding.[1]

§ 58. Persons in Representative or Official Capacity.— An appeal may be taken by a person in a representative or official capacity, such as an executor or administrator, receiver or other trustee or custodian of funds for designated purposes, if he is a party aggrieved.[2] Since it is the duty of a personal representative of an estate to defend it from all unjust and illegal attacks which affect the interests of heirs, devisees, legatees or creditors, he is interested in any claim made against the estate which may diminish it, or may make the fund from which the creditors are to be paid insufficient for that purpose, and is aggrieved by any ruling thereon adverse to the estate.[3] But as between the parties interested in the estate, it is the rule that administrators or executors, and also receivers, or other trustees or custodians of funds for designated purposes are not ordinarily affected by orders

1. Application of Herman, 59 Cal. Dec. 653, 191 Pac. 934 (the cases holding that it must appear by the record that the appellant is aggrieved in the sense that he has been deprived of a legal right by the judgment are not authority where the right of becoming a party is given by statute and the public has a direct interest in the controversy).

2. In re Blythe, 103 Cal. 350, 37 Pac. 392 (holding that an executor is not aggrieved by an order refusing to direct payment of interest on attorney's fees awarded his counsel). And see cases cited infra.

3. Estate of Levy, 141 Cal. 646, 99 Am. St. Rep. 92, 75 Pac. 301 (holding executor may appeal from an order setting apart a homestead for the widow during administration); In re Heydenfeldt, 117 Cal. 551, 49 Pac. 713 (appeal from order directing executor to redeem certain land from a foreclosure sale). See Estates; Executors and Administrators.

in reference to their disposition, and, therefore, will not be heard on appeal from such orders.[4] An executor, for example, does not represent any of the legatees as against the others, nor may he litigate their claims at the expense of the estate,[5] especially when he himself is the legatee whose claim he is attempting to maintain.[6]

But this last stated rule has its well-defined limitations. It does not operate wherever an order or decree involves a construction of the proper exercise of the duties of the officer, or wherever it presents a question as to the right or power of the trustee to comply with it, or wherever obedience to it might subject him to liability.[7] Even where the order is one merely for the payment of funds, if any of these questions arise under it and personal liability may attach, the right of the officer to appeal is recognized and upheld.[8]

4. Estate of Ross, 179 Cal. 358, 182 Pac. 303; Estate of Ayers, 175 Cal. 187, 165 Pac. 528; Estate of Piper, 147 Cal. 606, 82 Pac. 246; Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766; Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383 (under this rule trustees appointed under a will who have sued to obtain a construction of the will are not aggrieved by an order allowing an attorney and guardian ad litem for minor heirs a fee for his services to be paid out of the estate); In re Welch, 106 Cal. 424, 39 Pac. 805 (executor); Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383; Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; Estate of Marrey, 65 Cal. 287, 3 Pac. 896; Rosenberg v. Frank, 58 Cal. 387, 420; Estate of Wright, 49 Cal. 550; Bates v. Ryberg, 40 Cal. 463; In re Coursen's Estate, 6 Cal. Unrep. 756, 65 Pac. 965; Edwards v. Western Land & Power Co., 27 Cal. App. 726, 151 Pac. 16 (appeal by receiver). See Estate of Ross, 179 Cal. 358, 182 Pac. 303 (citing Estate of Healy, 137 Cal. 474, 70 Pac. 455; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008, and holding in effect that the same reasons are applicable to a judgment in an action between heirs to enforce an agreement as to their respective rights of inheritance).

5. Roach v. Coffey, 73 Cal. 281, 14 Pac. 840 (holding that an executor is a mere stakeholder, whose duty it is to preserve the estate and distribute it as the court shall direct); Bates v. Ryberg, 40 Cal. 463.

6. Estate of Marrey, 65 Cal. 287, 3 Pac. 896.

7. Estate of Carr, 175 Cal. 387, 165 Pac. 958; In re Welch, 106 Cal. 424, 39 Pac. 805.

8. In re Welch, 106 Cal. 424, 39 Pac. 805 (a special administrator may appeal from an order directing him to pay arrearage of family allowance which has accrued since

Particular orders.—An executor named in a will is a party aggrieved by an order refusing or revoking probate,[9] and an executor or guardian is technically aggrieved by orders requiring the payment of claims against the estate.[10] Likewise, an executor or administrator, as such, has the right to appeal from an order settling his accounts.[11] But in his representative capacity, he is not aggrieved by an order awarding costs against him personally. It is said that he should, by appropriate motion, connect himself in his individual capacity with the proceedings in the trial court after the imposition of costs upon him, and then appeal in his individual capacity, as a party aggrieved.[12] A party claiming the right to administer an estate is aggrieved by a denial of that right and by an order granting letters to another.[13]

Decree of partial distribution.—As the code declares that an executor or administrator may resist an applica-

the suspension of the general administrator, and also from a decree of partial distribution).

9. Estate of Collins, 174 Cal. 663, 164 Pac. 1110.

10. Estate of Snowball, 156 Cal. 235, 104 Pac. 446 (appeal by executor from order directing payment of family allowance); Guardianship of Breslin, 135 Cal. 21, 66 Pac. 962 (appeal by guardian from order directing payment to state for care of his insane ward in the state hospital); Estate of Smith, 117 Cal. 505, 49 Pac. 456 (a personal representative of an insolvent estate may appeal from a premature order directing the payment of a preferred claim, though perhaps he would not be an aggrieved party where, upon the settlement of his account after the giving of statutory notice, the court makes such an order and the only question is as between two creditors as to whether both have preferred claims).

11. Estate of McPhee, 154 Cal. 385, 97 Pac. 878 (holding the right of an executor to appeal from an order settling his accounts is not defeated or affected by any subsequent order revoking his letters); Estate of Heaton, 139 Cal. 237, 73 Pac. 186 (a special administrator may be aggrieved by an order settling his accounts and directing him to pay the balance in his hands to another person described as executor or administrator).

12. Meyer v. O'Rourke, 150 Cal. 177, 88 Pac. 706.

13. Estate of Danke, 133 Cal. 433, 65 Pac. 889; Estate of Graves, 8 Cal. App. 254, 96 Pac. 792 (a public administrator is a person interested in an estate so as to contest letters of administration and appeal from an adverse order). See, generally, GUARDIANS; EXECUTORS AND ADMINISTRATORS.

tion for partial distribution of an estate, it follows that, as personal representative, he may appeal from an order directing such distribution, if aggrieved.[14] While perhaps an executor may not be aggrieved if the only effect of the partial distribution were to reduce the residue of the estate to the extent of the legacies distributed—the interest of the residuary devisees only being affected in such case[15]—it is clear that he is aggrieved and may appeal when there is a question as to the sufficiency of the assets to pay the legacies without loss to creditors.[16]

§ 59. **Heirs, Legatees, Devisees and Creditors.**—A probate of a will is a proceeding in rem binding on all persons interested in the will, and a contestant has a right to appeal therefrom.[17] Likewise, the beneficiaries under a trust created by a will are aggrieved parties entitled to appeal from an order refusing probate thereof.[18] Heirs have a right of appeal from an adverse order in a proceeding to contest letters of administration; [19] and they may appeal from an order allowing an attorney compensation for extraordinary services.[20] Since the heirs, legatees and devisees are the only ones who can be

14. Estate of Mitchell, 121 Cal. 391, 53 Pac. 810; Estate of Kelley, 63 Cal. 106 (under Code Civ. Proc., § 1660).

15. Estate of Friedman, 171 Cal. 431, 441, 153 Pac. 918 (where the court said that there is doubt whether an executor whose rights are not involved in the decree of partial distribution and where no liability could attach to him for a compliance with the decree has any right whatsoever to appeal from it, and citing to this point: Bates v. Ryberg, 40 Cal. 463; Estate of Wright, 49 Cal. 550; Roseberg v. Frank, 58 Cal. 387; Estate of Marrey, 65 Cal. 287, 3 Pac. 896; Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383; In re Welch, 106 Cal. 427, 39 Pac. 805; Estate of Williams, 122 Cal. 76, 54 Pac. 386; Estate of Murphy, 145 Cal. 464, 78 Pac. 960; Estate of Young, 149 Cal. 173, 85 Pac. 145). See People v. Dates, 29 Cal. App. 260, 155 Pac. 112.

16. Estate of Colton, 164 Cal. 1, 127 Pac. 643; Estate of Murphy, 145 Cal. 464, 78 Pac. 960.

17. Estate of Allen, 176 Cal. 632, 169 Pac. 364. See WILLS.

18. Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340.

19. Estate of Graves, 8 Cal. App. 254, 96 Pac. 792.

20. Estate of Riviere, 7 Cal. App. 755, 96 Pac. 16.

aggrieved by a decree of distribution, they are the proper parties to make the appeal therefrom.[1]

Creditors.—While the heirs, legatees or devisees may appeal from a decree of distribution, an appeal cannot be taken by an executor of the estate, or a legatee or devisee, or a creditor of such estate whose claim has not been presented or litigated in the hearing.[2] Inasmuch as the liabilities for the estate are with the personal representative, errors in the accounts of such representative, if any there be, do not aggrieve a personal creditor of the representative within the meaning of the code.[3] But a creditor of an insolvent estate is aggrieved by and may appeal from an erroneous order of family allowance;[4] and the fact that the executor may also appeal does not deprive him of the right.[5]

§ 60. **Other Persons.**—Where the plaintiff in an interpleader suit has paid the money into court and the conflicting claimants have interpleaded, and the plaintiff has no further interest in the case, he cannot take an appeal from the judgment.[6] And where an order for a writ of assistance upon ex parte application is inoperative against any other person than the defendant, such other persons are not aggrieved thereby and cannot appeal therefrom.[7] It has been held, also, that a party to an action is not affected by a judgment upon motion against the surety upon the stay bond and that he may not appeal therefrom, unless it was taken against him or in some manner

1. Estate of Williams, 122 Cal. 76, 54 Pac. 386; Bates v. Ryberg, 40 Cal. 463. See supra, § 58 (executor as party aggrieved).

2. Estate of Carr, 175 Cal. 387, 165 Pac. 958. See Estate of Crooks, 125 Cal. 459, 58 Pac. 89 (holding a mortgagee of an heir cannot appeal where there is no showing in the record that the debt has not been paid).

3. Estate of De Rome, 175 Cal. 399, 165 Pac. 919; In re Stakes, 1 Cal. Unrep. 585.

4. Estate of Bell, 157 Cal. 529, 108 Pac. 497.

5. Estate of Fretwell, 152 Cal. 573, 93 Pac. 283.

6. Woodmen of the World v. Rutledge, 133 Cal. 640, 643, 65 Pac. 1105.

7. Miller v. Bate, 56 Cal. 135.

amounted to an adjudication by which he is concluded in some right.[8] And trustees who claim funds in the hands of the executor adversely to the estate, but who have not presented any claim against the estate, are not parties aggrieved by a decree distributing the funds to the heir.[9]

An alleged incompetent is held to be a party aggrieved by an order adjudging him incompetent and appointing a guardian to manage his property.[10] And in a case where the right of a plaintiff in a claim and delivery suit to the possession of the property sued for depends upon ownership in the defendant, it has been decided that the defendant is aggrieved by an erroneous judgment for the plaintiff on the pleadings, upon his denial of ownership, where no costs are awarded and the judgment is not in the alternative.[11]

Order granting new trial as to one party.—Where a judgment is rendered for the plaintiff and against one defendant, but is silent as against a codefendant, if the defendant against whom judgment is rendered obtains an order granting a new trial, such order does not affect the judgment in favor of the other defendant, and he, not being aggrieved thereby, cannot appeal therefrom.[12]

II. ESTOPPEL, LOSS OR WAIVER OF RIGHT.

§ 61. Waiver Generally.—It is clearly competent for a party to waive error by not appealing from an erroneous judgment or order.[13] And it is well settled that a party cannot appeal from an order on a motion which he

8. Churchill v. More, 7 Cal. App. 767, 96 Pac. 108.

9. In re Burdick, 112 Cal. 387, 44 Pac. 734.

10. Matter of Moss, 120 Cal. 695, 53 Pac. 357.

11. Martin v. Porter, 84 Cal. 476, 24 Pac. 109 (action by an assignee for the benefit of creditors against an insolvent debtor, to recover property not scheduled).

12. Rankin v. Central Pacific R. R. Co., 73 Cal. 96, 15 Pac. 57.

13. Worth v. Emerson, 3 Cal. App. 158, 85 Pac. 664, and cases cited infra.

abandoned, as where he fails to appear and prosecute his motion.[14]

Agreement waiving right of appeal.—While in some jurisdictions it has been held that a mere promise or agreement not to prosecute an appeal will not divest an appellate court of its jurisdiction, it is a general rule that where such an agreement is made upon a valid and legal consideration, either before or after trial, it will be enforced in an appellate court and afford ground for dismissal of an appeal taken in violation thereof. It is perfectly competent for the parties to determine in the preliminary steps of the litigation whether they will place a question in dispute in a condition to be reviewed on appeal, and there is no reason why they may not waive an appeal entirely.[15]

§ 62. By Consent.—It is the well-established rule that a judgment or order will not be reviewed or disturbed on an appeal prosecuted by a party who consented to the making thereof.[16] Hence, when the record discloses that the judgment or order was entered pro forma and by consent, it will dismiss the appeal on motion,[17] or, in the

14. Frank v. Doane, 15 Cal. 302; Mahoney v. Wilson, 15 Cal. 42; Green v. Doane, 1 Cal. Unrep. 86.

15. United States Consol. Seeded Raisin Co. v. Chaddock & Co., 173 Fed. 577, 19 Ann. Cas. 1054, 97 C. C. A. 527; Oliver v. Blair, 2 Cal. Unrep. 441, 5 Pac. 917. See generally, 2 Ruling Case Law, p. 59.

16. Hibernia Savings & Loan Soc. v. Waymire, 152 Cal. 286, 92 Pac. 645; Estate of Treadwell, 111 Cal. 189, 43 Pac. 584; Erlanger v. Southern Pacific R. Co., 109 Cal. 395, 42 Pac. 31; San Francisco Savings Union v. Myers, 72 Cal. 161, 13 Pac. 403 (where the judgment contains recitals as to the hearing of evidence, it will be presumed, though, that the judgment was based upon evidence bearing on the issues, and not upon consent); La Societe Francaise v. Beardslee, 63 Cal. 160; San Francisco v. Certain Real Estate, 42 Cal. 513; Brotherton v. Hart, 11 Cal. 405; Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294. See infra, § 498, as to review of orders consented to.

17. Hibernia Savings & Loan Soc. v. Waymire, 152 Cal. 286, 92 Pac. 645; Erlanger v. Southern Pacific R. Co., 109 Cal. 395, 42 Pac. 31; San Francisco v. Certain Real Estate, 42 Cal. 513.

absence thereof, it will affirm the judgment or order.[18] A judgment by stipulation is one by consent within the rule;[19] or consent may be implied from an acceptance of, or acquiescence in, the order or decree,[20] or by an acceptance of such benefits under the order or decree as is inconsistent with an exercise of the right to appeal therefrom.[1] The fact that the party gave assent reluctantly does not alter the case,[2] although doubtful cases should be construed in favor of the right of appeal.[3] Where a judgment relates to two or more distinct matters, it has been held that consent to one portion constitutes a waiver of the right to appeal from that portion, though it does not preclude an appeal from other and independent parts of the judgment.[4]

Limitations on rule.—To preclude a review of an order on the ground of acquiescence, it must be clear that the party assented to the judgment or order appealed from, and that such consent was voluntary and absolute.[5] Doubtful clauses in a judgment tending to show consent should be liberally construed in favor of the right of appeal. Hence it has been held that a recital in a judgment that no opposition was made thereto is not of itself sufficient to show the assent of the party, for he may have been absent from the courtroom, or he may have been present and merely passive. In neither case can it

18. La Societe Francaise v. Beardslee, 63 Cal. 160; Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 Pac. 82.

19. Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294.

20. Estate of Treadwell, 111 Cal. 189, 43 Pac. 584 (acquiescence in an order annulling letters of guardianship); Conlin v. Southern Pacific R. Co., 40 Cal. App. 743, 182 Pac. 71 (where party voluntarily acquiesced in or recognized the validity of a judgment in eminent domain proceedings).

1. See infra, § 64.

2. Conlin v. Southern Pac. R. Co., 40 Cal. App. 743, 182 Pac. 71 (citing authorities to this and other points).

3. See infra, this section, as to limitations of rule.

4. Duncan v. Duncan, 175 Cal. 693, 167 Pac. 141; Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864.

5. Duncan v. Duncan, 175 Cal. 693, 167 Pac. 141.

be said that he assented to the judgment.[6] And in a case where a party excepts to the action of a court in striking out items from a complaint, though he agrees that, as the amount left is not within the jurisdictional limits of the court, the only consequence of its order is a dismissal of the action, it has been held that the judgment of dismissal is not one by consent.[7] Of course, if it appears from the record that the consent was given only pro forma to facilitate an appeal and with the understanding on both sides that the party did not intend thereby to abandon his right to be heard on appeal in opposition to the judgment or order, he is not precluded from taking an appeal.[8]

§ 63. By Compliance With Judgment or Order.—It is well settled that a party cannot prosecute an appeal from a judgment or order after a voluntary compliance with it, as by a voluntary payment or satisfaction of record of a money judgment.[9] The code provides that:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."[10]

6. San Francisco v. Certain Real Estate, 42 Cal. 513.

7. County of Placer v. Freeman, 149 Cal. 738, 87 Pac. 628.

8. Mecham v. McKay, 37 Cal. 154; Natoma Water & Min. Co. v. Clarkin, 14 Cal. 544, 549 (a consent to a nonsuit reserving the liberty to move to set it aside does not bar right to have it reviewed on appeal).

9. Buckeye Refining Co. v. Kelly, 163 Cal. 8, Ann. Cas. 1913E, 840, 124 Pac. 536 (holding that the defendant may satisfy the judgment and waive his appeal, and the creditor cannot object to his doing so merely because he has taken an appeal and given a stay bond); Bank of Martinez v. Jahn, 104 Cal. 238, 38 Pac. 41; In re Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; People v. Burns, 78 Cal. 645, 21 Pac. 540 (holding that the fact that the appeal is taken from an order denying a new trial is immaterial); Hurt v. Bauer, 37 Cal. App. 109, 173 Pac. 601; Churchill v. More, 7 Cal. App. 767, 96 Pac. 108 (where a surety company satisfied the judgment); People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029. See supra, §§ 12, 13.

10. Code Civ. Proc., § 1049.

When a judgment has been satisfied, it has passed beyond review, for the satisfaction thereof is the last act and end of the proceeding.[11] This code section cannot, however, be invoked to abridge the right of appeal where a judgment has been satisfied against the will of the appellant. And it is the established rule in this state that the enforced satisfaction of a judgment does not prevent the prosecution of an appeal therefrom by the defendant.[12] In like manner the right of appeal cannot be cut off by the action of the court in setting off one judgment against another.[13] Even the voluntary payment of a judgment will not deprive a party of his right to appeal therefrom, unless the payment is by way of compromise, or with an agreement not to take or pursue an appeal.[14] One against whom a judgment is rendered must expect to see his property seized and sold at a sacrifice if he fails to satisfy it. Indeed, payment under such circumstances might well be regarded as compulsory. Furthermore, the statute anticipates cases of this kind and provides that if the judgment appealed from is reversed, the appellate court may make or compel restitution.[15]

11. Estate of Shaver, 131 Cal. 219, 63 Pac. 340; Estate of Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405.

12. Knight v. Merks, 60 Cal. Dec. 83, 191 Pac. 531 (judgment satisfied by execution); Sunset Lumber Co. v. Bachelder, 167 Cal. 512, 517, Ann. Cas. 1916B, 664, 40 Pac. 35 (holding this principle to be applicable where the holder of a mortgage appealing from a judgment foreclosing a mechanic's lien on the property is compelled to bid in the property at the sale to protect his interests); Patterson v. Keeney, 165 Cal. 465, Ann. Cas. 1914D, 232, 132 Pac. 1043; Buckeye Refining Co. v. Kelly, 163 Cal. 8, Ann. Cas. 1913E, 840, 124 Pac. 536; Warner Bros. Co. v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017; Yndart v. Den, 125 Cal. 85, 89, 57 Pac. 761; Vermont Marble Co. v. Black, 123 Cal. 23, 55 Pac. 599; Kenney v. Parks, 120 Cal. 22, 52 Pac. 40; Ramsbottom v. Fitzgerald, 6 Cal. Unrep. 214, 55 Pac. 984.

13. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786.

14. Warner Bros. Co. v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017; Hayes v. Nourse, 107 N. Y. 577, 579, 1 Am. St. Rep. 891, 14 N. E. 508.

15. Warner Bros. Co. v. Freud, 131 Cal. 639, 645, 82 Am. St. Rep. 400, 63 Pac. 1017.

Compliance with mandate.—Under the rule stated above an appeal from a judgment awarding a writ of mandamus cannot be taken after a compliance by the party with the mandate of the court.[16] And where a mandamus has been granted to compel a county auditor to issue his warrant for the amount of an allowed claim, his voluntary compliance with the mandate precludes the prosecution of an appeal by him or by the county on his behalf.[17]

§ 64. **By Acceptance of Benefits.**—It is a general rule that by the acceptance of the benefit of a decree a party waives all right of appeal therefrom. The right to accept the fruits of a judgment and the right to appeal therefrom are not concurrent, but are wholly inconsistent. An election to take one of these courses will be construed as a renunciation of the other.[18] This rule proceeds upon the theory that acceptance of the fruits of a judgment is in effect the party's affirmance of the validity of the judgment against him.[19] If a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of

16. Moore v. Morrison, 130 Cal. 80, 62 Pac. 268; San Diego School Dist. v. Board of Supervisors, 97 Cal. 438, 32 Pac. 517; Leet v. Board of Supervisors, 5 Cal. Unrep. 573, 47 Pac. 595.

17. Moore v. Morrison, 130 Cal. 80, 62 Pac. 268.

18. Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 Pac. 464; Ayers v. Ross, 175 Cal. 191, 165 Pac. 529 (holding a party who has accepted property distributed to him in accordance with an agreement differing from the provisions of the will cannot appeal from a judgment refusing to set aside the agreement); Estate of Ayres, 175 Cal. 188, 165 Pac. 528; Bunting v. Haskell, 152 Cal. 426, 93 Pac. 110; Turner v. Markham, 152 Cal. 246, 92 Pac. 485; San Bernardino v. Riverside, 135 Cal. 618, 67 Pac. 1047; Storke v. Storke, 132 Cal. 349, 352, 64 Pac. 578; Warner Bros. Co. v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017; Estate of Shaver, 131 Cal. 219, 63 Pac. 340 (distributees of an estate who have received all the property thereof cannot appeal from the decree of distribution); Kenney v. Parks, 120 Cal. 22, 52 Pac. 40. See Alexander v. Jackson, 3 Cal. Unrep. 344–350, 25 Pac. 415 (holding that the appeal would not be dismissed where the plaintiff refused to accept the sum tendered in satisfaction of the judgment).

19. Turner v. Markham, 152 Cal. 246, 92 Pac. 485.

such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring the reversal of that part also, the party so accepting the fruits of a part of the judgment in his favor is estopped from prosecuting an appeal from those parts which are against him.[20] And it has been held, where in a divorce action a decree is denied both parties but an award of alimony is made to the wife, that her acceptance of the payments of alimony awarded estops her from making a motion for a new trial for the purpose of having the judgment reviewed on appeal.[1]

The rule and the principle are the same whether the judgment be the final determination of a cause or an intermediate order made in the course of the proceeding. A party cannot accept the benefit or advantage given by an order and then seek to have it reviewed.[2] Accordingly, where an order is made upon the condition of the payment of costs, an acceptance of such costs is a waiver of the right to appeal from the order.[3]

Limitation of rule.—A limitation of the rule above stated exists where a reversal of the judgment or order cannot affect the right of the appellant to the benefit secured, as when the only controversy relates to a greater sum. In such a case he is not precluded from an appeal, even though he has received the amount awarded to him.[4]

20. Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 Pac. 517.

1. See ALIMONY, Vol. 1, p. 1014 (§ 66).

2. San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047.

3. San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047. But see Tyson v. Wells, 1 Cal. 378 (holding that where the court makes an order granting a new trial on payment of costs by the defendant, the plaintiff by accepting payment of costs does not waive his right to appeal, as the order being conditional is not operative until the performance of the condition, and it would have been useless to appeal before that time). See Wolff & Co. v. Canadian Pacific Ry., 89 Cal. 332, 26 Pac. 825 (not deciding the point as it was not directly involved). See COSTS.

4. Estate of Ayers, 175 Cal. 187, 165 Pac. 528; Coffman v. Bushard, 164 Cal. 663, 130 Pac. 425; Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 Pac. 517; First Nat. Bank v.

In accordance with these rules, a defendant cannot, after the acceptance of the costs awarded him, appeal from the judgment, where a reversal of the judgment would necessitate a new trial and vacate the judgment for costs, so that his ultimate right thereto would depend upon the result of the second trial. But where the relief sought on the appeal can be given by a modification of the erroneous portion of the judgment without disturbing the judgment, the appeal will be retained unless upon an examination of the merits it appears that a new trial must be ordered.[5] It has been held, where a decree of foreclosure awards judgment for the defendant upon a counterclaim, that the plaintiff, by enforcing a sale of the mortgaged premises, does not estop himself from appealing from the part of the judgment against him.[6]

III. PARTIES.

§ 65. In General.—The code provides that—

"The party appealing is known as the appellant, and the adverse party as the respondent."[7]

The term "adverse party" occurs also in the section of the code relating to the service of notice of appeal when the appeal is taken by the regular method. A discussion of who is an adverse party will appear in that connection.[8]

Wakefield, 138 Cal. 561, 72 Pac. 151; San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047 (holding, however, that the limitation did not apply in this case); Goodlett v. St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505 (where a judgment of foreclosure gives a mortgagee an absolute right to sell the mortgaged premises, the exercise of the right does not amount to a waiver of the right to appeal from that part of the decree fixing the personal liability for a deficiency); McCaleb v. McCaleb, 32 Cal. App. 648, 163 Pac. 1045.

5. Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 Pac. 517.

6. First Nat. Bank v. Wakefield, 138 Cal. 561, 72 Pac. 151.

7. Code Civ. Proc., § 938 (in part).

8. See infra, § 120.

Executors and administrators.—The reasons why an executor or administrator may not appeal from a decree of distribution are equally persuasive against his right to be heard, either voluntarily or involuntarily, as respondent, and also as to his being a necessary party to an appeal from a decree of distribution.[9]

Intervention.—While the code authorizes a person having the requisite interest to intervene before the trial of an action, there is no authority for such intervention after judgment and while a cause is pending on appeal. An execution creditor cannot, therefore, intervene in the supreme court and prevent a reversal of the judgment appealed from pursuant to stipulation of the parties.[10]

Effect of death or transfer of interest.—The effect of the death of a party or transfer of interest after judgment and pending appeal, and the method of substituting the representative or transferee, are elsewhere discussed,[11] except when authorized by statute under the following code provision:

"In the event of the death of any person having at his death a right of appeal the attorney of record representing the decedent in the court in which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or administrator of the estate of the decedent."[12]

§ 66. Joinder.—Inasmuch as the singular number includes the plural, the provision authorizing "any party aggrieved" to appeal may be read so as to authorize any number of parties claiming to be aggrieved to join

9. Jones v. Lamont, 118 Cal. 499, 62 Am. St. Rep. 251, 50 Pac. 766. See supra, § 58.

10. Leonis v. Biscailuz, 101 Cal. 330 (explained in Trumpler v. Trumpler, 123 Cal. 248, 254, 35 Pac. 875).

11. See ABATEMENT AND REVIVAL, Vol. 1, p. 49 et seq. (as to effect of transfer of interest); and pp. 76–79 (as to effect of death after judgment, verdict or submission of the cause).

12. Code Civ. Proc., § 941b.

in one appeal.[13] They may join though their interests be several and distinct. Parties aggrieved by a decree of distribution, for example, may join as appellants even though, after reversal, they will upon the subsequent proceedings in the court below assert different and distinct interests in the property. That the decision on appeal may establish their rights thereto does not oblige them to take separate appeals.[14] Moreover, the defendants to a cross-complaint may join in an appeal from a judgment against them, though in the action as originally brought they are on opposite sides of the case.[15]

There is no way or mode pointed out in our code for a plaintiff or defendant desiring to appeal to compel his co-defendant or coplaintiff to join him in the appeal. Neither is there any way to compel a severance, as under the old systems.[16] The code allows any and every party to appeal without joining anyone else, no matter what may be the character of the judgment against him, whether joint or several. In this respect it works a change from the former practice.[17] When, however, the defendants compose an official board, and as such, an integral body, it is required that an appeal from an adverse judgment must be on the part of all or none of

13. Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027; Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415; In re California Mut. L. Ins. Co., 81 Cal. 364, 22 Pac. 869 (holding separate creditors of an insolvent who have a common interest in the reversal or modification of a decree as to the mode of payment of their claims, and who are all aggrieved in the same way and by the same portion of the decree, may prosecute a joint appeal).

14. Estate of Sutro, 152 Cal. 249, 92 Pac. 486.

15. Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

16. Under the common-law practice, persons against whom a joint judgment was rendered were required to join in writ of error unless a severance was effected. See 2 Ruling Case Law, p. 66.

17. Senter v. De Bernal, 38 Cal. 637 (under section 335 of the Practice Act, being the same provision as contained in Code Civ. Proc., § 938). See Estate of Bell, 157 Cal. 528, 108 Pac. 497 (holding that a creditor of an estate has an absolute right to appeal separately, when the others refuse to join).

them.[18] In a case where some of several defendants make default and others answer, the defaulting defendants may appeal from the final judgment at any time within the time limited for appealing from final judgment.[19]

E. PRESENTING AND RESERVING OBJECTIONS IN TRIAL COURT.

I. NECESSITY IN GENERAL.

§ 67. General Rule.—It is a well-established general rule that, with certain exceptions to be noted hereafter, an appellate court will consider only such objections as were raised in the trial court.[20] This rule precludes a party from asserting on appeal, claims to relief not asserted or asked for in the court below.[1] And it also pre-

18. Hopkins v. Sanderson, 29 Cal. App. 666, 668, 159 Pac. 1063.

19. Gimmy v. Doane, 22 Cal. 635.

20. Estate of Rohrer, 160 Cal. 574, Ann. Cas. 1913A, 479, 117 Pac. 672 (on appeal from an order settling an executor's accounts, an objection to the allowance of an attorney's fee cannot be made for the first time); Di Nola v. Allison, 143 Cal. 106, 101 Am. St. Rep. 84, 65 L. R. A. 419, 76 Pac. 976 (an estoppel of appellant to question sale under which plaintiff claims title to land sued for cannot be presented for the first time on appeal); Richey v. Haley, 138 Cal. 441, 71 Pac. 499; Williams v. McDonald, 58 Cal. 527; Lybecker v. Murray, 58 Cal. 186; King v. Meyer, 35 Cal. 646 (a plaintiff cannot assert the invalidity of the contract under which the defendant claims for the first time on appeal); Powell v. Ross, 4 Cal. 197 (an objection that securities sued on are not promissory notes cannot be raised for the first time on appeal); Boot v. Boyd, 37 Cal. App. 545, 555, 174 Pac. 352 ("It has long been the rule in this state that the appellate court will not review or consider points which have not been made in the court below"); In re Estate of Pohlmann, 2 Cal. App. 360, 84 Pac. 354. See Barlow v. Frink, 171 Cal. 165, 152 Pac. 290 (holding that an appellate court will not in the first instance undertake to construe a contract and have its determination operate as law of the case on a new trial).

See infra, § 79, as to exceptions to the rule; CRIMINAL LAW, as to rule in criminal cases; and see JUSTICES OF THE PEACE, as to rule on appeal from decisions of justices' courts.

1. Rimmer v. Hotchkiss, 162 Cal. 385, 123 Pac. 256; Buck v. Canty, 162 Cal. 226, 238, 121 Pac. 924 (judgment will not be reversed because of a failure of the trial

vents an appellant from raising matters of defense not pleaded in the trial court,[2] for if the rule were otherwise, the plaintiff would be deprived of the opportunity of meeting such defense by proper proofs.[3] This rule also precludes a respondent on appeal from presenting defenses not pleaded in the court below for the purpose of upholding the judgment in his favor and resisting a reversal. A sufficient reason for denying him this right, says the court in a recent case, is that the defense is not within the issues.[4] If, however, a defendant pleads a particular de-

court to give relief not embraced in the pleadings and not asked for); Miller v. Bay Cities Water Co., 157 Cal. 256, 285, 27 L. R. A. (N. S.) 772, 107 Pac. 115; Huffner v. Sawday, 153 Cal. 86, 93, 94 Pac. 424; Green v. Carotta, 72 Cal. 267, 13 Pac. 685.

2. Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 Pac. 293 (defense of lack of tender); Blake v. Arp, 180 Cal. 144, 179 Pac. 683; Parkside Realty Co. v. McDonald, 166 Cal. 426, 137 Pac. 21; Edmonds v. Webb, 129 Cal. 619, 62 Pac. 171; Estate of Young, 123 Cal. 337, 55 Pac. 1011 (when in an action to set apart a homestead the validity of the homestead is admitted, this issue cannot be presented on appeal); Hanson v. Frecker, 79 Cal. 283, 21 Pac. 751; Deady v. Townsend, 57 Cal. 298 (action to foreclose a street assessment in which it was attempted on appeal to raise the objection for the first time that the assessment included certain unauthorized incidental expenses); Randall & Co. v. Yuba County, 14 Cal. 219 (a county cannot object on appeal that an account presented was not properly authenticated); Castro v. Gill, 5 Cal. 40 (a tenant sued for possession of the leased premises cannot for the first time on appeal object that prior notice to quit was not given); California Loan & Trust Co. v. Hammell, 5 Cal. Unrep. 282, 43 Pac. 955; Nilson v. Wahlstrom, 40 Cal. App. 237, 551, 180 Pac. 358; Berthiaume v. Doe, 22 Cal. App. 78, 133 Pac. 515; Fair v. Home Gas & Electric Co., 15 Cal. App. 705, 115 Pac. 754; McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. 193; Hill v. Barnes, 8 Cal. App. 58, 69, 96 Pac. 111. And cases cited infra, applying the rule to certain specific defenses. See generally, PLEADING.

3. Larkin v. Mullen, 128 Cal. 449, 454, 60 Pac. 1091; Poole v. Caulfield, 45 Cal. 107.

4. Eucalyptus Growers Assn. v. Orange County N. & L. Co., 174 Cal. 330, 163 Pac. 45 (excuses for nonperformance of contract not apparent on the face of the contract and not embraced within the facts alleged in the complaint cannot be advanced in support of an appeal or as a reason why a new trial should not have been granted if not pleaded in the answer); Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 761, 137 Am. St. Rep. 165, 110 Pac. 123.

fense, it is not necessary that he should urge it in his argument in the court below in order that he may avail himself of it upon appeal, especially when the court finds favorably thereon. There is no rule which precludes a party from availing himself of every fact in issue found in his favor, and besides, the appellate court cannot ascertain from the record whether a defense was not urged in argument.[5]

Applications of rule.—Under the general rule above stated, an appellant cannot on appeal for the first time plead the following defenses: Want of capacity in the plaintiff to sue,[6] laches,[7] and the bar of the statute of limitations.[8] And where a plaintiff is permitted to give proof of an agreement without objection that it was not in writing, it cannot be urged on appeal for the first time that the agreement is unenforceable because not in writing.[9] Pursuant to the same rule it has been held that, as against an equitable suit to enjoin the execution of a judgment, it cannot be urged for the first time on appeal that the plaintiff's remedy is by motion in the action instead of by suit.[10]

5. Vassault v. Seitz, 31 Cal. 225, distinguishing McDonald v. Bear River & Auburn W. & M. Co., 13 Cal. 220; Myers v. South Feather Water Co., 10 Cal. 579.

6. Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. 908; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451 (an objection that a partnership doing business under a fictitious name has not filed a certificate of partnership goes to its capacity to sue within the rule).

7. Tracy v. Smith, 175 Cal. 161, 165 Pac. 535; Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21; Larkin v. Mullen, 128 Cal. 449, 60 Pac. 1091; Hill v. Barnes, 8 Cal. App. 58, 96 Pac. 111.

8. Barber v. Mulford, 117 Cal. 356, 49 Pac. 206; Zellerbach v. Allenberg, 99 Cal. 57, 69, 33 Pac. 786; Pryal v. Pryal, 7 Cal. Unrep. 134, 138, 71 Pac. 802.

9. Nunez v. Morgan, 77 Cal. 427, 433, 19 Pac. 753; Sweetland v. Shattuck, 66 Cal. 31, 4 Pac. 885; Gower v. Bertrand (Cal. App.), 186 Pac. 172; McComish v. Kaufman (Cal. App.), 185 Pac. 476; Armstrong v. Barceloux, 34 Cal. App. 433, 167 Pac. 895 (having failed to object to the evidence or move for a nonsuit, the defendant cannot raise the point on appeal).

10. Broadway Ins. Co. v. Wolters, 128 Cal. 162, 60 Pac. 766.

§ 68. Adherence to Theory of Case.—It is well settled that the theory upon which a case is tried in the court below must be adhered to on appeal.[11] To permit a party who has tried his case wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position and adopt a different theory on appeal, would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.[12] And the reason of the rule is particularly applicable where the respondent insists in the lower court on trying the case on the theory contended for by the appellant on appeal,

11. Lamberson v. Bashore, 178 Cal. 321, 173 Pac. 401; Bird v. American Surety Co., 175 Cal. 625, 630, 166 Pac. 1009 (stating the rule but holding that the record did not disclose a different theory on appeal from that adopted in the trial court); Pacific Portland Cement Co. v. Hopkins, 174 Cal. 251, 255, 162 Pac. 1016 (an appellant cannot abandon the theory on which it began its action and demand a reversal upon the ground that the defendant did not plead, and the court did not find, with sufficient particularity the existence of the very conditions which the plaintiff asserted as the foundation of his rights); Tanforan v. Tanforan, 173 Cal. 270, 159 Pac. 709 (where a complainant seeks to have a deed set aside on the ground of duress and fraud, he cannot ask the appellate court to decide the question on the ground that the defendant exercised undue influence); Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 89 Pac. 93 (where a referee's partial report was treated as making a prima facie case); Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 24, 82 Pac. 374; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 41 L. R. A. (N. S.) 529, 124 Pac. 704; Durkee v. Chino Land & Water Co., 151 Cal. 561, 91 Pac. 389; Horn v. Hamilton, 89 Cal. 276, 26 Pac. 833; United States Farm Land Co. v. Darter (Cal. App.), 183 Pac. 696 (where the case was tried on the theory that the parties sustained the relation of principal and agent and it was contended on appeal that the relationship was that of vendor and purchaser); Merrill v. Kohlberg, 29 Cal. App. 382, 387, 155 Pac. 824; Parr v. Baer, 24 Cal. App. 149, 140 Pac. 712; Nilson v. Oakland Traction Co., 10 Cal. App. 103, 111, 101 Pac. 413; Nishkian v. Chisholm, 2 Cal. App. 496, 84 Pac. 312 (where certain documents are admitted in evidence without objection and are treated by both sides as evidence in the case and as making a prima facie case, it cannot be objected on appeal that such documents were not proper evidence). And cases cited infra.

12. Merrill v. Kohlberg, 29 Cal. App. 382, 155 Pac. 824, quoting Lebcher v. Lambert, 23 Utah, 1, 63 Pac. 628.

but in pursuance of objections by him is overruled by the court. The appellant in such case will not be heard to say that the trial proceeded on an erroneous theory.[13]

The rule even extends to cases where the parties try their cause upon a particular theory as to what the law of the case is. For example: When an action is tried on the assumption acquiesced in by both sides, that a certain rule for the measure of damages is correct, the defeated party cannot on appeal urge that the standard by which the damages were assessed was not the correct one.[14]

Applications of rule generally.—By virtue of the general rule above stated, the parties must on appeal adhere to the construction placed by them upon their pleadings in the trial court.[15] It has been held that a plaintiff who has treated a counterclaim or cross-complaint as having been properly filed, and has in effect waived his objection to its filing, cannot on appeal urge that the defendant had no right to file it.[16] And where a defendant obtained a transfer of an action from the justice's to the superior court on the ground that the plaintiff's right depended upon the ownership of land, he will not be permitted to assert in the superior court, or on appeal therefrom, that such ownership was insufficient to establish his right.[17] Other applications of the rule are noted in certain of the sections immediately following.[18]

13. Merrill v. Kohlberg, 29 Cal. App. 382, 155 Pac. 824 (where the defendant insisted that the trial should proceed on a certain theory of damages and on appeal urged that this was not the true measure of damages).

14. Durkee v. Chino Land & Water Co., 151 Cal. 561, 570, 91 Pac. 389; Kincaid v. Dunn, 26 Cal. App. 686, 148 Pac. 235.

15. See infra, § 69, as to rule where parties treat certain issues as properly presented.

16. Placerville Gold Min. Co. v. Beal, 168 Cal. 682, 144 Pac. 748 (counterclaim); McDonald v. Hulet, 132 Cal. 154, 64 Pac. 278 (counterclaim); Pierson v. Smith, 27 Cal. App. 48, 148 Pac. 801 (cross-complaint). See infra, § 77, as to waiver of objections which are cured by verdict.

17. Lamberson v. Bashore, 178 Cal. 321, 173 Pac. 401.

18. See infra, §§ 69–71.

§ 69. Adherence to Theory as to Issues Presented.—Under the general rules of law that the issues to be tried in an action are those presented by the pleadings and that the findings should be confined to facts in issue,[19] where the parties have proceeded to trial upon a pleading without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact and the issue found upon, the party whose duty it was to object will not on appeal be heard to say that the finding is not within the issues.[20] Hence it has been repeatedly held in this state that where the trial court and the parties to an action proceed to a trial of the cause upon the theory that there is a material issue, and the court upon evidence addressed to that issue and received without objection finds in accordance with that evidence and upon the theory that an appropriate issue was raised by the pleadings, the parties will not, nor will either of them, be allowed on appeal for the first time to say there was no such issue.[1] The rule was recently stated by Mr. Justice Shaw in the following language:

19. See PLEADINGS.

20. Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 297, 47 Pac. 60.

1. Deseret Water Oil & Irr. Co. v. State, 176 Cal. 745, 171 Pac. 287; Smithson v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148, 162 Pac. 111; Perry v. Angelus Hospital Assn., 172 Cal. 311, 156 Pac. 449; Barton Land & Water Co. v. Crafton Water Co., 171 Cal. 89, 152 Pac. 48; Hibernia Savings & Loan Soc. v. Dickinson, 167 Cal. 616, 140 Pac. 265 (where the court said: "We do not here refer to those cases where facts are treated on the trial as alleged or as admitted, and afterward on appeal the losing party seeks to gain advantage by the technical omission or failure to properly allege or deny them"); Crescent Lumber Co. v. Larson, 166 Cal. 168, 171, 135 Pac. 502; Gervaise v. Brookins, 156 Cal. 110, 112, 103 Pac. 332 (explaining Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 60, and stating: "In that case the presence in the record of a finding of fact which it was claimed was not in issue was considered a sufficient showing that the cause was tried upon the theory that the fact was in issue"); Peck v. Noce, 154 Cal. 351, 97 Pac. 865; Colegrove Water Co. v. Hollywood, 151 Cal. 425, 431, 13 L. R. A. (N. S.) 904, 90 Pac. 1053; Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 353, 89 Pac. 93; Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 19, 34, 82 Pac. 374; Parke & Lacy

"It appears to be established that where the appeal is upon the judgment-roll alone, or where it appears that no objection was made to the admission of evidence of a fact and the trial was had upon the theory that the fact was in issue, the objection that the finding of fact was outside of the issues will not be considered on appeal."[2]

If, therefore, certain evidence is treated as within the issues, it cannot be objected upon appeal that instructions

Co. v. San Francisco Bridge Co., 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71; Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501; Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; McDougald v. Hulet, 132 Cal. 154, 163, 64 Pac. 278; Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434; Barbour v. Flick, 126 Cal. 628, 59 Pac. 122; Casey v. Leggett, 125 Cal. 664, 672, 58 Pac. 264; Lee v. Murphy, 119 Cal. 364, 375, 51 Pac. 549, 955; Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 297, 47 Pac. 60; Burnham v. Stone, 101 Cal. 164, 35 Pac. 627; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; San Diego Land and Town Co. v. Neale, 88 Cal. 50, 55, 11 L. R. A. 604, 25 Pac. 977; White v. White, 86 Cal. 219, 21 Am. St. Rep. 26, 24 Pac. 996 (where in a divorce action the court finds that a contract pleaded by the defendant as to community property is invalid, and where evidence proving its invalidity is admitted without objection); Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083; In re Doyle, 73 Cal. 564, 15 Pac. 125; Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Spiers v. Duane, 54 Cal. 176; Tulley v. Tranor, 53 Cal. 274; Cave v. Crafts, 53 Cal. 135, 141; Tevis v. Hicks, 41 Cal. 123; Roberts v. Sierra Ry. Co., 14 Cal. 180; Gale v. Tuolumne Water Co., 14 Cal. 25; Ryan v. Pacific Axle Co., 6 Cal. Unrep. 902, 68 Pac. 498; Coffman v. Singh (Cal. App.), 193 Pac. 259 (where a case was tried upon the theory that contributory negligence was in issue, though it was not pleaded); McCord v. Martin (Cal. App.), 191 Pac. 89; Fernandez v. Western Fuse and Explosives Co., 34 Cal. App. 420, 167 Pac. 900; O'Reilly v. All Persons, 29 Cal. App. 49, 154 Pac. 474; Elsom v. Neff, 27 Cal. App. 174, 149 Pac. 375; Ruperd v. Hunter, 40 Cal. App. 96, 180 Pac. 638; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; Pehl v. Fanton, 17 Cal. App. 247, 119 Pac. 400; Nielson v. Gross, 17 Cal. App. 74, 118 Pac. 725; Schroeder v. Mauzy, 16 Cal. App. 443, 447, 118 Pac. 459; Cargnani v. Cargnani, 16 Cal. App. 96, 101, 116 Pac. 306; Rutz v. Obear, 15 Cal. App. 435, 115 Pac. 67; Clark v. Bell, 14 Cal. App. 326, 111 Pac. 1037; Estate of Campbell, 12 Cal. App. 707, 108 Pac. 669, 676.

2. Peck v. Noee, 154 Cal. 351, 354, 97 Pac. 865.

are without the issues.[3] And this is the rule also as to the findings.[4]

Reason for rule.—The principle on which these decisions rest is that of equitable estoppel, it being held that a party who acquiesces and participates in the trial of an issue without objection, as if it arose from the pleadings, when he might have objected on the ground that the issue was not made by the pleadings in the trial court, and where the objection might have been met by amendment of the pleadings or otherwise, so that it would have operated less injuriously on the other party than if first made on appeal, has thereby waived the objection, and, therefore, should not be heard to make it on appeal.[5]

Limitation of rule.—The rule above stated can have no application if the evidence as to matters outside the issues is relevant also to prove matters within the issues. In that event, no estoppel can arise from a failure to object thereto.[6] Accordingly, the introduction of testimony tending to prove an admitted fact does not estop the party from claiming the benefit of the admission where the evidence is admissible also to prove disputed facts.[7]

§ 70. Application of Rule to Complaint Generally.—The rule just stated is frequently applied to complaints. A party cannot on appeal question the sufficiency of allegations where they were treated as sufficiently specific in the trial court.[8] Neither will he be allowed, under such

3. Dyas v. Southern Pacific Co., 140 Cal. 296, 307, 73 Pac. 972; Carpenter v. Ewing, 76 Cal. 486, 18 Pac. 432; Nilson v. Oakland Traction Co., 10 Cal. App. 102, 111, 101 Pac. 413.

4. Barton Land & Water Co. v. Crafton Water Co., 171 Cal. 89, 152 Pac. 48; Crowley v. City R. R. Co., 60 Cal. 628.

5. Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80.

6. Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 Pac. 502; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299.

7. Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715.

8. Christensen v. Jessen, 5 Cal. Unrep. 45, 40 Pac. 747; Haines v. Stilwell, 5 Cal. Unrep. 27, 40 Pac. 332 (where an essential allegation alleged by way of recital was treated as properly alleged).

circumstances, to object on appeal to the sufficiency of a common count.[9]

If a complaint is uncertain in that it cannot be ascertained therefrom whether the action was based on willful injury or negligence of the defendant, a defendant cannot complain of the defect on appeal, where the case was tried on the theory that the charge was negligence.[10] So, also, where a complaint is treated as sufficient to authorize exemplary damages for trespass, notwithstanding the fact that it is demurrable for uncertainty or ambiguity because the facts authorizing such damages are alleged in general terms, an objection to its sufficiency cannot be raised on appeal for the first time.[11] In a case, where the plaintiff pleads one cause of action and recovers upon another, which is tried without objection, the same general principle applies.[12]

§ 71. Sufficiency of Complaint.—Where the trial proceeds in all respects as though the complaint sufficiently states a cause of action, and the defendant goes to trial upon the theory that there is a material issue, anl allows evidence to be received upon such issue without objection in any way, and the court makes a finding upon such evidence, upon the theory that the proper issue is made by the pleadings, with no objection from either party, the parties will not, nor will either of them, be allowed on appeal to say, for the first time, there was no such issue.[13]

9. Rutz v. Obear, 15 Cal. App. 435, 115 Pac. 67.

10. Eylenfeldt v. United Railroads, 28 Cal. App. 56, 151 Pac. 293.

11. Avakian v. Noble, 121 Cal. 216, 53 Pac. 559.

12. Horton v. Dominguez, 68 Cal. 642; Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459. See infra, § 89, as to variance and trial.

13. Hibernia Savings & Loan Soc. v. Dickinson, 167 Cal. 616, 140 Pac. 265; Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501; McDougald v. Hulet, 132 Cal. 163, 64 Pac. 278; Stevens v. Truman, 127 Cal. 155, 59 Pac. 397 (where a petition for mandamus against a treasurer is treated as alleging that there were funds in his hands, the omission is not ground for reversal); Barbour v. Flick, 126 Cal. 632, 59 Pac. 122; People ex rel. Wicks v. Jones, 20 Cal. 50; Hoover v. Lester, 16 Cal. App. 151, 116 Pac. 382. And

This is especially true where there is not a total absence of allegations essential to a statement of a cause of action.[14]

In case of a total absence of an essential allegation, the general rule seems to be that a defendant who has treated a complaint as sufficient, has made no objection to the admission of evidence of an omitted allegation and has allowed the issue to be tried as though properly presented by the pleadings, cannot on appeal urge that it is defective through some omission which could have been supplied by amendment at the time.[15] However, there is some authority to the contrary in this point.[16]

see cases cited infra, this section, and infra, § 72.

14. Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60 (an action to foreclose a mortgage securing a bonded indebtedness of a corporation in which there was no allegation that the stockholders consented to the indebtedness but only a general allegation that the bonds were duly issued); Mabry v. Randolph, 7 Cal. App. 421, 94 Pac. 403.

15. Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90, followed in Noakes v. Los Angeles, 179 Cal. 38, 175 Pac. 409, and in Boyle v. Coast Improvement Co., 27 Cal. App. 714, 721, 151 Pac. 25, where the court, speaking through Hart, J., said: "Indeed, the principle as stated and applied in the Slaughter case has often been declared and approved in this state and thus has become so interwoven in our system that it may now well be said to be an elementary rule of practice in California, as, in the interest of justice, it should be in every other jurisdiction."

16. Yates v. James, 89 Cal. 474, 477, 26 Pac. 1073 ("as there is no allegation in the complaint upon which such a finding can be supported, the defendant is not estopped by his conduct at the trial from claiming the benefit of the objection he now makes"); Cameron v. Ah Quong, 8 Cal. App. 310, 315, 96 Pac. 1025, where the court said: "The fact that the appellant failed to object to evidence addressed to issues not tendered by the pleadings can be of no service or avail to the respondent intervener. It is well settled that where a complaint . . . entirely fails to state a cause of action, evidence offered and received, whether against or without objection, upon the theory, unsupported, or unfounded by the averments of the complaint, that the issues necessary to be determined are tendered and submitted by the pleadings, cannot cure the total absence of allegations essential to a statement of a cause of action. . . . If the rule were otherwise, . . . then certainly the rules of pleading would be absolutely worthless and count for naught." In this case, how-

In a very recent case the appellate court said:

"It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue."

And in denying a petition for rehearing, that court further said:

"Whatever answer to this question may be found in the decisions of our supreme and appellate courts, and it must be admitted that in some of them a negative answer finds support, we are satisfied that the rule should be as we have held."[17]

Even where the complaint lacks the averment of a fact essential to a cause of action, it may, nevertheless, be so aided by the averment of the fact in the answer as to uphold a judgment thereon.[18]

Applications of rule.—Where the parties proceeded on the theory that the complaint was sufficient and the issue made, and no objection was made to the trial court to the evidence offered on the issue, the rule has been applied where the complaint on a contract contained no allegation of a consideration;[19] or of nonpayment;[20] where, in an action of wrongful death, there was no allega-

ever, the evidence as to the omitted allegation was pertinent to the actual issues being tried, and could not have been objected to.

17. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90 (a hearing of this case in the supreme court was denied).

18. Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434, and cases cited; Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501.

19. Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501. ("We cannot allow the defendants to treat an issue as made by their answer, allow evidence to be introduced upon it, and, after the plaintiff has been put to the expense of a trial, and judgment rendered in her favor, to say here for the first time that the complaint does not show that the agreement was based upon a consideration. The ends of justice would not be subserved by such a rule.")

See infra, § 72, as for reason of rule.

20. Abner Doble v. Keystone Consol. Min. Co., 145 Cal. 490, 78 Pac. 1050.

tion of the existence of heirs;[1] and where the copy of the note sued on contained neither a promise to pay nor the name of a payee.[2]

§ 72. Necessity for and Sufficiency of Objection—Reason for Rule.—To avoid the application of the rule stated in the preceding section, the defendant should make a specific objection to the testimony offered as inadmissible because the complaint does not state a cause of action. An objection upon the usual general grounds or upon the ground that a proper foundation has not been laid for it or that the questions designed to bring out the facts are leading, is insufficient to call the plaintiff's attention to the defect in his complaint.[3] The necessity for objecting to the evidence is not excused by the fact that the defendant had interposed a general demurrer to the complaint, as such demurrer does not apprise the plaintiff of the defect in his pleading.[4]

Reason for rule.—The reason for the general rule above stated has been thus expressed:

"It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated."[5]

A leading authority has put the matter in this way:

"The general principle . . . appears to be that where there is any defect, imperfection, or omission in any

1. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90 (citing to the same effect, Texas & Pac. Ry. Co. v. Lacey, 185 Fed. 226, 107 C. C. A. 332).

2. Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309.

3. Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25.

4. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 326, 147 Pac. 90.

5. Greiss v. State Investment Co., 98 Cal. 241, 33 Pac. 195, per Temple C. (quoted with approval in Abner Doble Co. v. Keystone etc. Co., 145 Cal. 490, 78 Pac. 1050).

pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by verdict."[6]

§ 73. Rule as to Answer.—It is a general rule that where, notwithstanding the fact that the denials in an answer are not as broad as the allegations of the complaint or are otherwise insufficient to put the allegations of the complaint in issue, the answer is treated as putting the material facts in issue, the plaintiff cannot for the first time on appeal object that such denials were insufficient for any purpose.[7] By virtue of this rule, it cannot be urged on appeal that there was no issue to be tried, where the allegations of the complaint are treated,

6. From Chitty on Pleading, vol. 1, p. 705 (quoted in Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081, and in Abner Doble Co. v. Keystone etc. Co., 145 Cal. 490, 78 Pac. 1050).

7. Schuh v. R. H. Herron Co., 177 Cal. 13, 169 Pac. 682; Smithson v. Atchison-Topeka & S. F. Ry. Co., 174 Cal. 148, 162 Pac. 111; Bayly v. Lee, 174 Cal. 137, 162 Pac. 96; Zimmer v. Kilbourn, 165 Cal. 521, 132 Pac. 1025 (and in the absence of any showing to the contrary, it will be assumed on appeal that the answer was treated as a denial of all of the allegations in the complaint); Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715; Gervaise v. Brookins, 156 Cal. 110, 103 Pac. 332; Treanor v. Williams, 145 Cal. 315, 78 Pac. 84 (per Shaw, J., concurring); Weidenmueller v. Stearns Ranchos Co., 128 Cal. 623, 61 Pac. 374; Casey v. Leggett, 125 Cal. 664, 672, 58 Pac. 264; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; People v. Swift, 96 Cal. 165, 31 Pac. 16; In re Doyle, 73 Cal. 564, 15 Pac. 125; Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Cave v. Crafts, 53 Cal. 135; White v. San Rafael & S. Q. R. R. Co., 50 Cal. 417; Tulley v. Tranor, 53 Cal. 274; Green v. Lake Superior & Pacific Fuse Co., 46 Cal. 408; Racouillat v. Rene, 32 Cal. 450; Grogan v. Ruckle, 1 Cal. 194–231; Lucas v. Rea, 7 Cal. Unrep. 363, 101 Pac. 537; White v. Spreckels, 10 Cal. App. 287, 101 Pac. 920.

as in issue, notwithstanding an order inadvertently striking out the defendant's allegations of denial.[8] Similarly, an order striking out a defense is harmless, where, notwithstanding such order, the case is tried as though such defense were in issue.[9] And in the case of affirmative defenses, where the parties on the trial treat a defense as sufficiently pleaded, it will be so treated on appeal,[10] even though there may be an entire absence of an essential allegation.[11] It is immaterial in this respect whether the verdict is in favor of the plea and the plaintiff is appealing, or whether the verdict is against the plea and the plaintiff objects to a consideration of the errors because of the insufficiency of the plea.[12]

Again, where no answer is filed to an amended complaint, the plaintiff after going to trial as if there was a regular issue, and without making his objection known, cannot on appeal object to a want of answer to the

8. Pehl v. Fanton, 17 Cal. App. 247, 119 Pac. 400.

9. Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370.

10. Busch v. Los Angeles Ry. Co., 178 Cal. 536, 29 L. R. A. 1607, 174 Pac. 665; Kelly v. Santa Barbara Consol. Ry. Co., 171 Cal. 415, 421, Ann. Cas. 1917C, 67, 153 Pac. 903; Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549 (plea of justification); Lukeforth v. Lord, 87 Cal. 399, 25 Pac. 497 (defense of fraud, and distinguishing Albertoli v. Branham, 80 Cal. 633, on the ground that the evidence was objected to at the trial though the record did not show it); Thomas v. Black, 84 Cal. 221, 23 Pac. 1037 (defense of fraud); Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386 (plea of estoppel); Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Pacific Bridge Co. v. Kirkham, 54 Cal. 558; Hutchings v. Castle, 48 Cal. 152; King v. Davis, 34 Cal. 100 (defense of fraud); Davis v. Davis, 26 Cal. 23, 39, 85 Am. Dec. 157 (estoppel in pais); O'Brien v. New Method Co-op. Laundry Co., 38 Cal. App. 531, 176 Pac. 879 (issue as to contributory negligence); Southern Pacific Co. v. City of Santa Cruz, 26 Cal. App. 26, 145 Pac. 736 (where the plea was simply "that the action is barred by the statute of limitations"); Kriste v. International Savings & Exchange Bank, 17 Cal. App. 301, 119 Pac. 666.

11. Thomas v. Black, 84 Cal. 221, 23 Pac. 1037 (where, in a suit to replevy property seized under execution, the answer in pleading fraud fails to state that the property in question was the only property of the party out of which the execution might be satisfied).

12. Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

amended complaint.[13] And where, notwithstanding a failure of the plaintiff to file an answer to a cross-complaint, the parties treat its allegations as in issue and offer evidence touching the truth of its allegations, without objection, as though there had been a formal denial filed, the defendant cannot on appeal raise the question of want of answer.[14] A defendant who treats his pleading as a counterclaim cannot on appeal assert that it is in fact a cross-complaint and that he is entitled to judgment on the pleadings for want of an answer thereto.[15] And where, notwithstanding the sustaining of a demurrer to an answer, the allegations of a counterclaim are treated as still in issue, they will be so treated on appeal.[16]

II. NECESSITY FOR OBJECTIONS AND RULINGS THEREON.

§ 74. Necessity for Objection in General.—It is a well-settled rule that a party cannot urge, for the first time on appeal, objections which could have been obviated if made in the court below.[17] This doctrine is founded

13. Gale v. Tuolumne Water Co., 14 Cal. 25 (appeal by defendant); Morris v. Hartley, 26 Cal. App. 61, 69, 146 Pac. 73; Sauer v. Eagle Brew Co., 3 Cal. App. 127, 84 Pac. 425 (appeal by defendant).

14. Turner v. East Side Canal & Irr. Co., 169 Cal. 652, 147 Pac. 579; Stockton Combined H. & A. Wks. v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Kern Valley Bank v. Koehn, 19 Cal. App. 247, 125 Pac. 358; Conant v. Jones, 3 Idaho, 606, 32 Pac. 250; Netcott v. Porter, 19 Kan. 131.

15. Shain v. Belvin, 79 Cal. 262, 21 Pac. 747; McAbee v. Randall, 41 Cal. 136. See Erkins v. Ayer, 58 Cal. 310 (where the question arose on motion for new trial instead of appeal, the principle, however, being the same).

16. Placerville Gold Min. Co. v. Beal, 168 Cal. 682, 144 Pac. 748.

17. Willett v. Alpert (Cal.), 185 Pac. 976 (objection that notice of motion to dissolve an attachment was not filed in proper time); Title Ins. & Trust Co. v. California Development Co., 171 Cal. 227, 152 Pac. 564 (objections to appointment of receiver); Swayne & Holt v. Wells-Russell & Co., 169 Cal. 204, 146 Pac. 686 (objection to affidavit on application for continuance); Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 89 Pac. 93; Wadleigh v. Phelps, 147 Cal. 541, 82 Pac. 200; In re Mealy, 127 Cal. 103, 59 Pac. 313 (as to

partly upon a sort of estoppel, for where the objection is one which could, if made in the court below, have been obviated, it would be clearly unjust for a party to withhold his objection until upon appeal, when it is too late to correct the defect.[18]

Reasons for rule.—A party should not be allowed to speculate on the result of a trial, taking advantage of such result if in his favor and annulling it if adverse to him.[19] And a further reason for requiring an objection is to give the trial court an opportunity to correct alleged errors.[20] But when the defect is one which cannot under any circumstances be obviated, the reason of the rule fails and with it the rule itself fails.[1]

insufficiency of the bond in insolvency proceedings); Allstead v. Nicol, 123 Cal. 594, 56 Pac. 452 (objection that contract pleaded is too indefinite to be specifically enforced); Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Baxter v. Hart, 104 Cal. 344, 37 Pac. 941; Creditors v. Consumers' Lumber Co., 98 Cal. 318, 33 Pac. 196; Anderson v. Black, 70 Cal. 226, 11 Pac. 700; Clarke v. Huber, 25 Cal. 598; Gordon v. Clark, 22 Cal. 533; Mott v. Smith, 16 Cal. 533, 555; Morgan v. Hugg, 5 Cal. 409; Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 797, 145 Pac. 734 (objection to undertaking on attachment); Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 663, 128 Pac. 9, 18; People's Water Co. v. Lewis, 19 Cal. App. 622, 127 Pac. 506 (objection that the original patentee of the land under whom the plaintiff claimed had not complied with the conditions on which the land was granted); Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 309, 63 L. R. A. 33, 47 L. Ed. 480, 23 Sup. Ct. Rep. 375; Examiner Printing Co. v Aston, 238 Fed. 459, 472, 151 C. C. A. 395 (quoting Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779, to the effect that the rule is universal that nothing which occurs in the progress of a trial can be assigned for error on appeal unless it was first brought to the attention of the trial court).

18. Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 Pac. 1050; Allstead v. Nicol, 123 Cal. 594, 56 Pac. 452; Greiss v. State Investment Co., 98 Cal. 241, 33 Pac. 195; Hellings v. Wright, 29 Cal. App. 649, 654, 156 Pac. 365.

19. Myers v. McDonald, 68 Cal. 162, 167, 8 Pac. 809.

20. Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692.

1. People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27; Mott v. Smith, 16 Cal. 533, 555.

Objections not subject to waiver.—Questions of jurisdiction over the subject matter, and as to the sufficiency of the complaint upon the point whether the facts stated constitute a cause of action, are never waived in any case, and may be raised for the first time on appeal.[2] Indeed, the code after specifying the grounds of demurrer expressly provides as follows:

"If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."[3]

Hence, upon an objection which goes to the existence of the cause of action, and which is apparent on the face of the record, it has been held, where the record contains internal evidence that the document on which the defendant bases his defense is a forgery, that the objection may be raised for the first time on appeal.[4] But objections to matters of procedure,[5] or those which may be raised by special demurrer,[6] mere irregularities, and the like, can be obviated, and must therefore be raised in the trial court or the objection will be deemed waived.[7]

§ 75. Jurisdiction.—While it is thoroughly established that an objection that the court did not have jur-

2. See infra, §§ 75, 78.

3. Code Civ. Proc., § 434.

4. Fuller v. Ferguson, 26 Cal. 546, 575.

5. Shain v. Peterson, 99 Cal. 486, 33 Pac. 1085; Myers v. McDonald, 68 Cal. 162, 8 Pac. 809.

6. See infra, § 77.

7. Wadleigh v. Phelps, 147 Cal. 541, 82 Pac. 200 (that an affidavit in opposition to a motion for a change of venue was not properly verified); Higgins v. City of San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209 (followed in People v. Rodley, 131 Cal. 240, 252, 63 Pac. 351 (that on a motion for a change of judges because of bias of the trial judge, the judge examined an affiant with reference to statements in his affidavit); Myers v. McDonald, 68 Cal. 162, 8 Pac. 809 (granting continuance to one of several parties); King v. La Grange, 61 Cal. 221, 232 (that the court on the death of a party had no authority to continue the action against another as his successor in interest).

isdiction over the person of the defendant is waived by a general appearance of the defendant without reservation and cannot be raised for the first time on appeal,[8] it is equally well established that an objection to the jurisdiction of a court over the subject matter of a suit cannot be obviated and may be presented on appeal for the first time.[9] And this rule extends to the want of jurisdiction in other tribunals besides courts, such, for example, as boards of supervisors.[10] When, however, a trial court has general jurisdiction of the subject matter and its jurisdiction over a particular case depends upon an adjudication of certain facts upon the existence of which its jurisdiction depends, the finding of the trial court as to such facts will not be reviewed upon appeal at the instance of a party who appeared therein and omitted to urge his objection, but proceeded upon the theory that the court had jurisdiction.[11] This rule precludes a will contestant who without objection submitted his contest to the court below, from raising the question for the first time on appeal that the deceased was a nonresident of the county,[12] or from urging defects in the notice of hearings, where the record does not affirmatively show that notice was not given.[13]

8. San Diego Savings Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; In re Thompson, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508. And cases cited infra.

9. Creditors v. Consumer's Lumber Co., 98 Cal. 318, 33 Pac. 196 (followed in In re Mealy, 127 Cal. 103, 59 Pac. 313, and holding insufficiency of the bond in insolvency proceedings does not go to the jurisdiction of the court within the meaning of the rule); Hallock v. Jaudin, 34 Cal. 167, 173; Mott v. Smith, 16 Cal. 533, 555; Stephens v. Weyl-Zuckerman & Co., 34 Cal. App. 210, 167 Pac. 171.

10. People v. Reclamation District No. 556, 130 Cal. 607, 612, 63 Pac. 27; In re Grove Street, 61 Cal. 438, 454.

11. Estate of Dombrowski, 163 Cal. 290, 125 Pac. 233; Estate of Latour, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441; People v. Reclamation District No. 556, 130 Cal. 607, 613, 63 Pac. 27.

12. Estate of Latour, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

13. Estate of Dombrowski, 163 Cal. 290, 125 Pac. 233 (notice of hearing on probate of will); Estate of Randall, 177 Cal. 363, 170 Pac. 835 (notice of hearing of application to revoke letters testamentary); Estate of Kasson, 119

Manner of obtaining jurisdiction.—Where an appeal to the superior court is tried without raising the objection that the cause is not within its appellate jurisdiction, and should have been certified thereto instead of appealed, the objection cannot be raised for the first time on appeal from the judgment of the superior court. That court has original jurisdiction of the case, and the objection goes to the manner in which jurisdiction is obtained rather than the jurisdiction of the court.[14]

Equity and probate jurisdiction of superior courts.—While it is true that in California the probate and equity jurisdictions of the superior court are distinct, it is also true that the same tribunal exercises both jurisdictions. When, therefore, a petition for equitable relief is filed in the probate division of the court, it may be regarded as a bill in equity, and it cannot be objected for the first time on appeal that the petition is wrongly entitled.[15] Conversely, it seems that a court of equity is not without jurisdiction of a suit to determine who is entitled to distribution of an estate, and where the parties treat a suit in equity for that purpose as properly before the court, the appellate court will so treat it.[16]

§ 76. **Parties.**—It cannot be objected for the first time on appeal that the plaintiff had no legal capacity to sue.[17]

Cal. 489, 51 Pac. 706 (notice of hearing of application for allowance of counsel fee).

14. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440; De Jarnatt v. Marquez, 132 Cal. 700, 64 Pac. 1090; Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562; Brians v. Superior Court, 32 Cal. App. 206, 162 Pac. 420; Bates v. Ferrier, 19 Cal. App. 79, 124 Pac. 889. See Stehlin v. Superior Court, 12 Cal. App. 421, 107 Pac. 568 (holding objection cannot be first raised on petition for writ of review).

15. In re Thompson, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508 (where, on final distribution of an estate, the residue is delivered to trustees, a petition to require them to account should be filed in equity; but if entitled in the matter of the estate, and no objection is made below, the objection cannot be first raised on appeal).

16. Simons v. Bedell, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac., 3. See COURTS; EQUITY.

17. Kline v. Guaranty Oil Co., 167 Cal. 476, 140 Pac. 1; Tibbetts

For example: that a person suing for revocation of the probate of a will had no right to sue;[18] or that an action for death of an infant was brought by the mother instead of the father;[19] or that a person intervening in an action had no right to do so;[20] or that a landlord was allowed to appear and defend an action against a tenant without an order of court allowing him to do so.[1]

Misjoinder.—The objection that there is a misjoinder of parties plaintiff cannot be urged for the first time on appeal.[2] The same is true of an objection to a defect or nonjoinder of parties. If the defendant's rights would be injuriously affected by reason of the absence of other necessary parties, it is his duty appropriately to call the court's attention to this fact with a request that they be brought in.[3]

v. Cohn & Co., 116 Cal. 365, 48 Pac. 372.

18. In re Robinson, 106 Cal. 493, 39 Pac. 862.

19. Bloxham v. Tehama County Tel. Co., 29 Cal. App. 326, 155 Pac. 654.

20. Baxter v. Vineland Irr. Dist., 136 Cal. 185, 68 Pac. 601; People v. Reis, 76 Cal. 269, 273, 18 Pac. 309 (a party who does not at the trial object to a complaint in intervention, cannot on appeal for the first time that the intervener had no right to intervene by reason of the insufficiency of the facts stated in the complaint); Smith v. Penny, 44 Cal. 161; McKenty v. Gladwin, Hugg & Co., 10 Cal. 227.

1. Dutton v. Warschauer, 21 Cal. 609, 620, 82 Am. Dec. 765.

2. Dewey v. Parcels, 137 Cal. 305, 70 Pac. 174; Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293; O'Callaghan v. Bode, 84 Cal. 489, 496; McDonald v. Bear River & Auburn Water Co., 13 Cal. 220, 238; Sands v. Pfeiffer, 10 Cal. 258; Conde v. Dreisam Gold Min. Co., 3 Cal. App. 583, 86 Pac. 825.

3. Osborn v. Hoyt (Cal.), 184 Pac. 854; Smith v. Cucamonga Water Co., 160 Cal. 611, 117 Pac. 525; Breitenbucher v. Oppenheim, 160 Cal. 98, 116 Pac. 55; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Potter v. Dear, 95 Cal. 578, 30 Pac. 777; Smith v. Davis, 90 Cal. 25, 36, 25 Am. St. Rep. 92, 27 Pac. 26; Hyde v. Stockwell (Cal. App.), 186 Pac. 391; Stone v. Hancock, 30 Cal. App. Dec. 558, 186 Pac. 604 (where the original mortgagee was not made a party to a foreclosure suit); Hyde v. Stockwell, 30 Cal. App. Dec. 544, 186 Pac. 391; Tubbs v. Delillo, 19 Cal. App. 612, 127 Pac. 514; Baker & Hamilton v. Lambert, 5 Cal. App. 708, 91 Pac. 340 (nonjoinder of a partner).

§ 77. Pleadings Generally.—In accordance with the general rule already stated, it is well settled that objections to defects of form in a pleading which might have been cured by amendment in the court below cannot be urged for the first time upon appeal.[4] In other words, a party cannot for the first time on appeal raise objections which are the subject of special demurrer,[5] or which are cured by verdict.[6]

In order that such defects may be considered on appeal, the party must make specific objection thereto in the trial court. And if he objects on certain grounds, he cannot on appeal raise other objections to the complaint, which might have been obviated by timely amendment; as by pointing out particular objections he has in effect assured the adverse party that he will urge no other objection.[7]

4. Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Larken v. Mullen, 128 Cal. 449, 60 Pac. 1091; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Vance v. Anderson, 113 Cal. 532, 45 Pac. 816; Baxter v. Hart, 104 Cal. 344, 37 Pac. 941; Wilkins v. Stidger, 22 Cal. 231, 235, 83 Am. Dec. 64; Stewart v. Dunlap, 4 Cal. Unrep. 503, 36 Pac. 2 (that a complaint of an assignee of an insolvent does not show that in the proceedings for his appointment a copy of the petition filed by creditors was served on the insolvent as required by law cannot be first urged on appeal, the record being silent on the subject); Mabry v. Randolph, 7 Cal. App. 421, 94 Pac. 403. And see cases cited infra.

5. L. A. Paving Co. v. Los Angeles Foundry Co. (Cal.), 186 Pac. 593 (where the complaint in an action to foreclose a street assessment lien failed to allege that the street improved is a public street); Campbell v. Genshlea, 180 Cal. 215, 180 Pac. 336 (absence of direct allegation of fraud); Shuken v. Cohen, 179 Cal. 279, 176 Pac. 447 (as to pleading of duress); Chamberlain v. Loewenthal, 138 Cal. 47, 70 Pac. 932; Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293; Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915; Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1029; Wedel v. Herman, 59 Cal. 507, 516; Gale v. Tuolumne County Water Co., 44 Cal. 43; In re Bullard's Estate, 3 Cal. Unrep. 688, 31 Pac. 1119 (bill of contest of will); Conde v. Dreisam Gold Min. Co., 3 Cal. App. 583, 590, 86 Pac. 825. For grounds of special demurrer, see PLEADING; and see in this connection, Code Civ. Proc., § 434.

6. Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Garcia v. Satrustegui, 4 Cal. 244 (where the declaration on a bond failed to allege delivery). See VERDICT.

7. Baum v. Roper, 132 Cal. 42, 64 Pac. 128; Madary v. Smartt,

Application of rule to complaints.—Pursuant to the rule above set forth, a party cannot object for the first time on appeal to the technical form of statement in which the facts in a complaint are alleged;[8] or that the complaint is ambiguous and uncertain;[9] or that a particular allegation is merely the statement of a conclusion of law;[10] or that the complaint contains no prayer for relief;[11] or that the complaint is not signed by the plaintiff or his attorney;[12] or that there is an improper joinder of causes of

1 Cal. App. 498, 82 Pac. 561 (where, in a suit to foreclose a mechanic's lien, it was not alleged that the materials sued for had actually been used in the building).

8. Parke & Lacy Co. v. Inter Nos Oil & D. Co., 147 Cal. 490, 82 Pac. 51; Chamberlain v. Loewenthal, 138 Cal. 47, 70 Pac. 932; Ackerman v. Merle, 137 Cal. 157, 69 Pac. 982; Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915; Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027; Coss v. MacDonough, 111 Cal. 662, 44 Pac. 325 (objection that the complaint on a mechanic's lien does not contain a sufficient description of the land); Kimball v. Richardson-Kimball Co., 111 Cal. 386, 397, 43 Pac. 1111 (complaint in intervention); Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 34, 41 Pac. 1024; Tuffree v. Polhemus, 108 Cal. 670, 676, 41 Pac. 806; San Francisco v. Pennie, 93 Cal. 465, 29 Pac. 66; Hiatt v. Board of Trustees, 65 Cal. 481, 4 Pac. 464 (where there was an attempt at a special denial); Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659 (where there is an attempt to plead facts, objection to the insufficiency of the pleading cannot be urged for the first time on appeal); Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; Mott v. Smith, 16 Cal. 533, 555; Sutter v. Cox, 6 Cal. 415; Christensen v. Jensen, 5 Cal. Unrep. 45, 40 Pac. 747 (objection that allegations were not sufficiently full); Dorn v. Oppenheim (Cal. App.), 187 Pac. 462; Ahearn v. Lane, 34 Cal. App. 314, 167 Pac. 303; Ryan v. Oakland Gas, Light & Heat Co., 21 Cal. App. 14, 26, 130 Pac. 693.

9. Rose v. Rose, 112 Cal. 341, 44 Pac. 658; Kirsch v. Derby, 96 Cal. 602, 31 Pac. 567; Reading v. Reading, 96 Cal. 4, 30 Pac. 803 (complaint for divorce on ground of habitual intemperance); Seligman v. Armando, 94 Cal. 315, 29 Pac. 710; Brown v. Martin, 25 Cal. 82–93 (complaint in ejectment); Silva v. Spangler, 5 Cal. Unrep. 277, 43 Pac. 617; Haines v. Stilwell, 5 Cal. Unrep. 27, 40 Pac. 332; In re Bullard's Estate, 3 Cal. Unrep. 688, 31 Pac. 1119; Johns v. Baender, 40 Cal. App. 790, 182 Pac. 55 (where allegation of fraud was indefinite); Merrill v. Kohlberg, 29 Cal. App. 382, 155 Pac. 824; Pavlovich v. Pavlovich, 22 Cal. App. 500, 135 Pac. 303; Webster v. Carr, 18 Cal. App. 772, 124 Pac. 447.

10. See infra, § 78.

11. Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083.

12. See infra, § 80.

action;[13] or that there are minor differences between the complaint filed and the copy served upon the adverse party;[14] or that matters which should have been alleged by supplemental complaint were set out in an amended pleading;[15] or that a supplemental complaint was filed containing matter not properly brought into the case,[16] as where it is objected that a supplemental cross-complaint set up a new cause of action accruing after the commencement of the action;[17] or that a cause of action pleaded in a cross-complaint is not a proper matter for cross-complaint.[18]

Application of rule to answers and defenses.—The plaintiff cannot object for the first time on appeal to the form and sufficiency of the denials in the answer;[19] or to a failure to state defenses separately;[20] or to the omission from the answer of a prayer for relief;[1] or that an affirmative defense is insufficiently pleaded;[2] or that a defense is rested upon an allegation of a conclusion of law;[3] or that a plea of the statute of limitations does not give the subdivision of the code section as required by the code;[4]

13. Worth v. Worth, 155 Cal. 599, 102 Pac. 663; Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16; Cox v. Western Pacific R. R. Co., 47 Cal. 87; Martin v. Wray, 1 Cal. Unrep. 25; Butters v. Brawley Star (Cal. App.), 191 Pac. 987.

14. McGinn v. Rees, 33 Cal. App. 291, 165 Pac. 52.

15. Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51.

16. Sinnige v. Oswald, 170 Cal. 55, 148 Pac. 203.

17. Kirsch v. Kirsch, 83 Cal. 633, 23 Pac. 1083.

18. Throop v. Weaver, 180 Cal. 335, 181 Pac. 55; Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. 1003; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075. See supra, § 68.

19. Zimmer v. Kilborn, 165 Cal. 523, Ann. Cas. 1914D, 368, 132 Pac. 1026; San Luis Water Co. v. Estrada, 117 Cal. 168, 172, 48 Pac. 1075; Walker v. Buffandeau, 63 Cal. 312; Green v. Lake Superior & Pacific Fuse Co., 46 Cal. 408.

20. Hyde v. Stockwell (Cal. App.), 186 Pac. 391.

1. Towdy v. Ellis, 22 Cal. 650, 660.

2. Rawlins v. Ferguson, 133 Cal. 470, 65 Pac. 957; Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 Pac. 195; Hutchings v. Castle, 48 Cal. 152; Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271; Rivera v. Cappa, 29 Cal. App. 496, 156 Pac. 1016, 1017.

3. Rivera v. Cappa, 29 Cal. App. 496, 156 Pac. 1016, 1017.

4. Churchill v. Woodworth, 148 Cal. 669, 676, 113 Am. St. Rep. 324,

or that a defense is not alleged with sufficient particularity;[5] or that there has been a withdrawal of a special defense by the defendant.[6]

§ 78. Failure to State Cause of Action or Defense.—It is a general rule that the objection that the complaint does not state a cause of action may be raised for the first time on appeal.[7] This rule applies where there are several counts and some of them are insufficient to state a cause of action,[8] unless the right to relief on the insufficient causes of action is abandoned and no judgment is rendered against the defendant thereon. In the latter case, the defendant will not on appeal be heard to complain that the complaint does not state facts entitling the plaintiff to relief prayed for but not granted.[9] Likewise, where an answer is so deficient in its averments that it does not even attempt to state a defense, the point may be raised for the first time on appeal.[10] The courts are not inclined to look favorably upon objections to pleadings specifically made for the first time on appeal, where upon suggestion

84 Pac. 155; Southern Pacific Co. v. Santa Cruz, 26 Cal. App. 26, 145 Pac. 736.

5. Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 Pac. 737; Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709 (defense of fraud).

6. Southern Pacific R. R. Co. v. Dufour, 95 Cal. 618, 19 L. R. A. 92, 30 Pac. 783.

7. Code Civ. Proc., § 434; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6, 84 Pac. 182; Bell v. Thompson, 147 Cal. 689, 82 Pac. 327; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445; Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891 (where judgment was rendered by default); Evans v. Gerken, 105 Cal. 311, 38 Pac. 725; Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73; Campbell v. Jones, 38 Cal. 507; Hallock v. Jaudin, 34 Cal. 167, 173; Haskell v. Moore, 29 Cal. 437; Mott v. Smith, 16 Cal. 533, 555; Gregory v. Ford, 14 Cal. 138, 143, 73 Am. Dec. 639; White v. Fratt, 13 Cal. 521, 526; Russell v. Byron, 2 Cal. 86; Nissen v. Bendixsen, 2 Cal. Unrep. 609, 9 Pac. 111; Cameron v. Ah Quong, 8 Cal. App. 310, 96 Pac. 1025 (complaint in intervention).

8. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 180, 100 Pac. 236; Haskell v. Moore, 29 Cal. 437.

9. Parker v. Herndon, 19 Cal. App. 451, 126 Pac. 183.

10. Cameron v. Ah Quong, 8 Cal. App. 310, 96 Pac. 1025.

before trial, the defect could have been easily overcome.[11] And they will in aid of the judgment, therefore, give the complaint as favorable an interpretation as its general scope will permit.[12]

While it has never been held that a defendant cannot raise the objection for the first time on appeal that there is an entire absence of both a direct and implied allegation of a material fact,[13] unless, as has been shown, the parties have treated the pleading as containing such allegation and tried the case upon the theory that a proper issue was made thereon by the pleadings,[14] a complaint will be held sufficient against such an objection where the facts essential to the cause of action appear by reasonable implication.[15] Thus, an allegation made in the form of a legal conclusion implies the necessary material facts and is sufficient against such an objection.[16] So, also, in an action based upon fraud, an allegation that statements

11. Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6, 84 Pac. 182.

12. Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6, 84 Pac. 182; Park & Lacy Co. v. Inter Nos Oil & D. Co., 147 Cal. 490, 82 Pac. 51; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 34, 41 Pac. 1024, 1025.

13. Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6, 84 Pac. 182; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445; Carroll v. Briggs, 138 Cal. 452, 454, 71 Pac. 501 (distinguishing cases); Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027; Ahearn v. Lane, 34 Cal. App. 314, 167 Pac. 303.

14. See supra, § 69.

15. McCombs v. Church, 180 Cal. 233, 378, 180 Pac. 535; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6, 84 Pac. 182; Irish v. Sunderhaus, 122 Cal. 308, 54 Pac. 1113; Alexander v. McDow, 108 Cal. 25, 29, 41 Pac. 25; De Flores v. Santa Cruz, 86 Cal. 191, 24 Pac. 1026 (where the complaint alleged a conveyance but did not directly allege the execution of a deed); Hill v. Hasken, 51 Cal. 175; Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234 (where there was a general allegation of desertion in a divorce complaint); Nevin v. Gary, 12 Cal. App. 1, 5, 106 Pac. 422.

16. Arnold v. American Ins. Co., 148 Cal. 660, 25 L. R. A. (N. S.) 6, 84 Pac. 182; Penrose v. Winter, 135 Cal. 289, 67 Pac. 772 (overruling Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891, and holding that an allegation in an action on a note "that there is now due and owing," etc., is sufficient to sustain a default judgment); Russ Lumber & Mill Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747; Frisch v. Caler, 21 Cal. 71.

were made falsely and fraudulently raises an implication that they were untrue, and that the defendant knew them to be untrue, or made them in a manner not warranted by his own information, although he believed them to be true, so as to preclude him from objecting to the insufficiency of the cause of action.[17] In like manner, it has been held that an allegation that the plaintiff acted on the representation raises an inference that the plaintiff relied thereon and believed in the truth of the representation.[18]

§ 79. Limitation of Rule.—The rule stated in the preceding section is subject to an exception or at least to a limitation where the objection is directed at the failure to plead matters which go to the plaintiff's right to maintain his action at the time and which are in nature and effect matter in abatement, but which under our system are required to be set out in the complaint. For example, while it is well settled that a complaint against an estate sounding in contract fails to state a cause of action, and is subject to general demurrer if it does not allege a prior presentation of the claim sued on to the administrator, it is equally well settled that this objection cannot be raised for the first time on appeal, but must first be presented in some manner in the trial court.[19] The merits of a claim do not depend in any degree upon its presentation and rejection before suit. The defense that a claim has not been presented or rejected before suit

17. Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011; followed in Campbell v. Genshlea, 180 Cal. 213, 362, 180 Pac. 336 (where fraud was alleged in general terms).

18. Nevin v. Gary, 12 Cal. App. 1, 5, 106 Pac. 422.

19. Burke v. Maguire, 154 Cal. 456, 463, 98 Pac. 21; Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561; Pennie v. Roach, 94 Cal. 515, 520, 29 Pac. 956, 30 Pac. 106; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811; Drake v. Foster, 52 Cal. 225; Bank of Stockton v. L. L. Howland & Co., 42 Cal. 129, 134; Peterson v. Hornblower, 33 Cal. 266, 278; Coleman v. Woodworth, 28 Cal. 567; Hentsch v. Porter, 10 Cal. 555, 561; Burmester v. McNear, 29 Cal. App. Dec. 466, 183 Pac. 832.

does not question either its validity or maturity, but simply challenges the remedy by suit on the ground that another remedy has priority and should be exhausted before suit. For these reasons this defense is in its nature and effect a defense in abatement and is presumed to be waived if not expressly made in the court of original jurisdiction.[20] Under the rule that the objection must be specific, it has been held that a general objection to the introduction of evidence on the ground that no proper foundation has been laid for the suit, or the cause of action, or for the introduction of the evidence, is not sufficiently specific to call the attention of the plaintiff to the point relied on.[1]

§ 80. **Signature and Verification.**—While there is some authority in other jurisdictions to the effect that an unsigned pleading is a nullity, the weight of authority is to the effect that the omission of the signature to a pleading is but an irregularity that does not affect the jurisdiction of the court and may be cured by amendment. The latter rule obtains in California,[2] and therefore it follows that an objection to a want of signature cannot be urged for the first time on appeal.[3]

Verification.—Technical objections to the verification cannot be urged for the first time on appeal. For example, it cannot be first urged on appeal that the verification is not authenticated by a notarial seal, that there is

20. Preston v. Knapp, 85 Cal. 559, 24 Pac. 811; Hentsch v. Porter, 10 Cal. 555, 561.

1. Burmester v. McNear, 29 Cal. App. Dec. 466, 183 Pac. 832.

2. Canadian Bank of Commerce v. Leale, 14 Cal. App. 307, 309, 111 Pac. 759 (citing many authorities from other jurisdictions); and see Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024 (holding that amendment of complaint by inserting signature of attorney does not prejudice any substantial right of the defendant). See PLEADING.

3. Hellings v. Wright, 29 Cal. App. 649, 654, 156 Pac. 365 (quoting approvingly from Meyer v. Delaware R. R. Const. Co., 100 U. S. 457, 25 L. Ed. 593; Sims v. Dame, 113 Ind. 127, 15 N. E. 217; Louisville etc. Ry. Co. v. Peck, 99 Ind. 68).

no venue to the affidavit, that there is no evidence that the officer was a notary, or that the affidavit does not show that it was made at any particular place.[4] The parties may even waive the verification entirely. A defendant cannot object for the first time on appeal that the petition for a writ of mandate was not verified as required by the code.[5] Nor, on the other hand, can the plaintiff, after a trial upon the merits without objection, raise the objection for the first time on appeal that the answer to his verified complaint was unverified. By proceeding to trial without objection, he is deemed to have waived the defect.[6]

§ 81. **Amendment.**—A party cannot raise, for the first time on appeal, the question whether the trial court erred in allowing a pleading to be amended;[7] or object that an amended complaint was filed without previous leave of court,[8] or that it sets up a new cause of action,[9] or effects a change of parties in the action.[10] Moreover, a defendant cannot object for the first time on appeal that a copy of an amendment to the complaint was not served upon

4. Kuhland v. Sedgwick, 17 Cal. 123.

5. People v. Reis, 76 Cal. 269, 276, 18 Pac. 309 (under Code Civ. Proc., § 1086).

6. Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; San Francisco v. Itsell, 80 Cal. 57, 22 Pac. 74; McCullough v. Clark, 41 Cal. 298; Greenfield v. Steamer Gunnell, 6 Cal. 67; Hill v. Nerle, 29 Cal. App. 473, 156 Pac. 981. As to verification of pleadings generally, see PLEADING.

7. Cox v. Western Pacific R. R. Co., 47 Cal. 87 (distinguished in Bowman v. Wohlke, 166 Cal. 121, 129, Ann. Cas. 1915B, 1011, 135 Pac. 37; McEwen v. New York Life Ins. Co. (Cal. App.), 183 Pac. 373 (holding that, in an action upon a life insurance policy, where the plaintiff fails to object to an amendment setting up false answers to questions, on the ground that such defense was eliminated by the incontestable clause in the policy, objection cannot be urged for the first time on appeal).

8. Bashore v. Lamberson, 36 Cal. App. 233, 171 Pac. 968.

9. Groom v. Bangs, 153 Cal. 456, 96 Pac. 503; Armstrong v. Barceloux, 34 Cal. App. 433, 167 Pac. 895; Eldridge v. Mowry, 24 Cal. App. 183, 190, 140 Pac. 978.

10. Bashore v. Lamberson, 36 Cal. App. 233, 171 Pac. 968.

him where evidence as to the matters embraced therein was introduced without objection.[11]

Under the rules applicable to amendments of pleadings,[12] it has been held that where the transcript shows simply that an order was made sustaining the demurrer without leave to plaintiff to amend, and that thereafter a judgment was given dismissing the action, and there is nothing to show that the plaintiff ever asked leave or desired to amend, it is the settled rule in this state that it is too late to make the point for the first time in the supreme court, that the trial court refused leave to amend. In such case the record must affirmatively show an abuse of discretion on the part of the lower court.[13]

11. Musselman v. Musselman, 3 Cal. App. 30, 84 Pac. 217.

12. It is provided by the code that "any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party" (Code Civ. Proc., § 472, in part). After trial of the issue of law raised by demurrer, however, the privilege of amending is not one of right, but rests in the discretion of the trial court. Schaake v. Eagle etc. Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759 (citing Buckley v. Howe, 86 Cal. 596, 25 Pac. 132, and construing Code Civ. Proc., § 472). See PLEADING.

13. Morrison v. Land, 169 Cal. 580, 147 Pac. 259; Marsh v. Lott, 156 Cal. 643, 649, 105 Pac. 968; Bell v. Bank of California, 153 Cal. 234, 244, 94 Pac. 889 (holding that no abuse of discretion appears); Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290; Prince v. Lamb, 128 Cal. 120, 130, 60 Pac. 689; Durrell v. Dooner, 119 Cal. 411, 51 Pac. 628; Robertson v. Burrell, 110 Cal. 568, 579, 42 Pac. 1086; Buckley v. Howe, 86 Cal. 596, 605, 25 Pac. 132; Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353; Varni v. Devoto, 10 Cal. App. 304, 101 Pac. 934; Butler v. Burt, 6 Cal. App. Unrep. 917, 68 Pac. 973 (where a judgment on the pleadings because of defects in the answer was rendered); Aalwyn v. Cobe, 168 Cal. 165, 142 Pac. 79 (holding that error will not be presumed where the record fails to show that leave to amend was asked and refused); Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 480, 63 Pac. 1025, 67 Pac. 759 (distinguishing authorities on the point); San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. 255 (not deciding the point). See Taylor v. Darling, 22 Cal. App. 101, 133 Pac. 503 (holding that a plaintiff suing a married woman who did not ask to be permitted to make the husband a

But where a complaint states a cause of action, it is an abuse of discretion, apparent upon the face of the record, to sustain a demurrer thereto on any ground without granting leave to amend.[14]

§ 82. **Admission of Evidence Generally.**—The rule that objections not made in the trial court will not be considered on appeal applies to the objection that evidence was erroneously admitted. If a party would take advantage of the admission of improper testimony, it is necessary that he object to its admission when it is offered.[15]

party defendant cannot complain of the rendition of judgment against him because of this defect).

14. Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 480, 63 Pac. 1025, 67 Pac. 759 (holding that the fact that the complaint had been previously amended does not justify a refusal of leave to amend in such a case).

15. Campbell v. Genshlea, 180 Cal. 215, 180 Pac. 336; Timmons v. Joplin, 157 Cal. 15, 106 Pac. 228; Fagan v. Lentz, 156 Cal. 681, 690, 20 Ann. Cas. 221, 105 Pac. 951; Dyas v. Southern Pacific Co., 140 Cal. 296, 73 Pac. 972; People ex rel. Bledsoe v. Campbell, 138 Cal. 11, 70 Pac. 918 (election contest); Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606; Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835; Burnett v. Lyford, 93 Cal. 114, 28 Pac. 855; O'Connell v. Main & Tenth Sts. Hotel Co., 90 Cal. 515, 27 Pac. 373; Hitchcock v. Caruthers, 82 Cal. 523, 528, 23 Pac. 48 (evidence of character in a slander suit); In re McEachran, 82 Cal. 219, 225, 23 Pac. 46 (objection to oath of insolvent); Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Daniels v. Gualala Mill Co., 77 Cal. 300, 19 Pac. 519; In re Doyle, 73 Cal. 564, 15 Pac. 125; Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Wright v. Seymour, 69 Cal. 122, 10 Pac. 323; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131; McKay v. Riley, 65 Cal. 623, 4 Pac. 667; Hess v. Bolinger, 48 Cal. 349; Pratalongo v. Larco, 47 Cal. 378, 387; Parrott v. Byers, 40 Cal. 614, 626 (objection to deposition); Bliss v. Ellsworth, 36 Cal. 310; Keeran v. Allen, 33 Cal. 542, 547; Mott v. Smith, 16 Cal. 533; Potter v. Carney, 8 Cal. 574; Covillaud v. Tanner, 7 Cal. 38; Posten v. Bassette, 5 Cal. 467; McComish v. Kaufman (Cal. App.), 185 Pac. 476; Gille v. Anderson, 34 Cal. App. 237, 167 Pac. 193; Johns v. Baender, 40 Cal. App. 790, 182 Pac. 55; Goodwin v. Franich, 37 Cal. App. 493, 174 Pac. 83; Hastaran v. Marchand, 23 Cal. App. 126, 135, 137 Pac. 297; Johnston v. Porter, 21 Cal. App. 97, 131

A mere objection to the testimony may not be alone sufficient to preserve the right of the objecting party to have the question so presented reviewed.[16] The party offering evidence is entitled to have the particular portion of the evidence objected to pointed out, and the specific ground of the objection stated, in order that he may obviate the objection or waive the testimony, if he is unwilling to take the risk of error. It is not permissible, when a witness takes the stand, to object generally to all the testimony he will give, then go through an examination without further objection, and if it should turn out that a few lines of it are improper testimony, claim that the judgment should be reversed on that ground.[17]

Time of objection.—When a question is improper, the objection should be made before the answer to the question is given, if possible. A party will not be permitted to speculate on the favorableness of an answer, and then if the answer is unfavorable, move to strike it out. If there is an opportunity to object, and no objection be made, a motion to strike out evidence is not available to a party against whom the evidence is introduced.[18] When the question propounded to a witness shows upon its face that the testimony called for is necessarily inad-

Pac. 69; Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744; Willeford v. Bell, 5 Cal. Unrep. 679, 49 Pac. 6; People v. Parrott, 1 Cal. Unrep. 412; Berri v. Fitch, 1 Cal. Unrep. 53; United States v. Moreno, 68 U. S. 400, 17 L. Ed. 633; Rogers v. Ritter, 79 U. S. 317, 20 L. Ed. 417. See infra, § 91, as to objection to insufficiency of evidence to sustain verdict or findings.

16. De Bock v. De Bock, 29 Cal. App. Dec. 833, 844, 184 Pac. 890 (per concurring opinion of Hart, J.).

17. Satterlee v. Bliss, 36 Cal. 489, 510 (per Sawyer, C. J.). See Garber v. Gianella, 98 Cal. 527, 33 Pac. 458 (holding that an objection to allowing any further testimony upon the ground that after the denial of a motion for nonsuit it was incompetent to call other witnesses, cannot be used as against any particular testimony thereafter introduced but not specially objected to).

18. Price v. Northern Electric Ry. Co., 168 Cal. 173, 180, 142 Pac. 91; Wright v. Seymour, 69 Cal. 122, 10 Pac. 323; Pinto v. Seeley, 22 Cal. App. 319, 135 Pac. 43; Johnston v. Beadle, 6 Cal. App. 251, 91 Pac. 1011 (quoting People v. Williams, 127 Cal. 212, 59 Pac. 581); Giffen v. Selma Fruit Co., 5 Cal. App. 50, 89 Pac. 855.

missible, the rights of the party are fully preserved by his objection to the proposed evidence, and his exception to the ruling admitting it. It is not necessary in such case, in order to save the point, to move to strike out the testimony after it is admitted.[19] But if it is not apparent from the question itself that the response thereto will, upon any theory of the case, be inadmissible and the inadmissible evidence is for the first time disclosed by the answer of the witness, it is necessary to move to strike it out when its inadmissibility appears, if an objection thereto is to be availed of on appeal.[20] And a party against whom evidence is admitted should move to strike it out when it is volunteered by a witness,[1] as where the witness answers so quickly that counsel has no opportunity to interpose an objection.[2]

Renewal of objection.—Where a party has once made a proper objection and reserved an exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence of the objectionable matter arising upon the examination of other witnesses.[3]

19. Short v. Frink, 151 Cal. 83, 90 Pac. 200.

20. Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658; Short v. Frink, 151 Cal. 83, 90 Pac. 200 (but holding no motion necessary, as the inadmissibility appeared from the question); Watson v. Miller, 6 Cal. Unrep. 316, 58 Pac. 135 (where on objection counsel explains the purpose of the testimony, and the testimony when admitted proves to be immaterial, a motion to strike it out is necessary to a review of the question); De Bock v. De Bock, 29 Cal. App. Dec. 833, 842, 184 Pac. 890 (citing People v. Lawrence, 143 Cal. 148, 68 L. R. A. 193, 76 Pac. 893); Park v. Orbison, 29 Cal. App. Dec. 689, 184 Pac. 428; Johnston v. Beadle, 6 Cal. App. 251, 91 Pac. 1011 (citing People v. Williams, 127 Cal. 212, 59 Pac. 581).

1. Renton v. Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820; Fox v. Fox, 25 Cal. 587; Luty v. Cresta, 4 Cal. App. 589, 88 Pac. 642. See Gordon v. Roberts, 30 Cal. App. 76, 79, 157 Pac. 15 (holding objection after answer without merit in the absence of a motion to strike out).

2. In re Hess' Estate (Cal.) 192 Pac. 35; Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; Pinto v. Seeley, 22 Cal. App. 319, 135 Pac. 43.

3. Green v. Southern Pacific Co., 122 Cal. 563, 55 Pac. 577 (followed in People v. Driggs, 12 Cal. App. 240, 108 Pac. 62, a criminal case; distinguished in Estate of Huston,

Likewise, where after an objection to a question, similar questions differing only in phraseology are put, it is not necessary to renew the objection.[4]

§ 83. Evidence Admitted Subject to Objection or Motion. Parties cannot absolve themselves from the necessity of objecting to the evidence by consenting in advance to admit it subject to all legal objections or exceptions. They cannot in this manner place upon the trial court the responsibility of discovering whatever objections might exist to the evidence offered, and then, after fishing for a verdict below, for the first time on appeal assign objections and charge the trial court with error in failing to sustain an unspoken objection.[5] This rule is applicable as well where the parties agree on the facts. If the agreed statement is admitted in evidence without objection, neither party can raise the point on appeal that some of the facts were not admissible under the pleadings, even though they stipulated that the facts were admitted "subject to all legal objections."[6]

Admission subject to motion to strike out.—When evidence is admitted by the court subject to a motion to be thereafter made to strike it out, the party must move to strike it out if he wishes to raise the question upon appeal. If he fails to do so, he will be deemed to have acquiesced in the evidence remaining before the jury.[7]

The practice of receiving evidence which is objected to,

163 Cal. 166, 174, 124 Pac. 852, on the ground that in that case there was no objection, and consequently no exception); Sharon v. Sharon, 79 Cal. 633, 674, 22 Pac. 26, 131.

4. Magee v. North Pacific Coast R. R. Co., 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114 (holding that the silence of the party in such case will not debar him from having his exception reviewed).

5. Hess v. Bolinger, 48 Cal. 349; Covillaud v. Tanner, 7 Cal. 38.

6. Hess v. Bolinger, 48 Cal. 349.

7. Cederberg v. Robison, 100 Cal. 93, 100, 34 Pac. 625 (followed in People v. Durrant, 116 Cal. 179, 219); King v. Haney, 46 Cal. 560, 13 Am. Rep. 217; Crosett v. Whelan, 44 Cal. 200; Barsi v. Simpson, 31 Cal. App. 612, 161 Pac. 127; Tarpey v. Veith, 22 Cal. App. 289, 134 Pac. 367.

subject to the objection and without a ruling thereon, is not, except under very exceptional circumstances, to be commended. And where such a course is followed, a ruling should be made prior to the conclusion of the trial and in time to enable the party to present his case in the light of such ruling.[8]

§ 84. Application of Rule to Objection to Evidence.— In accordance with the rule requiring one to object to the introduction of evidence, a party who permits a fact to be proved by incompetent evidence without objection, waives all question of admissibility.[9] He cannot, for example, object for the first time on appeal that his adversary proved his case by secondary evidence.[10] To permit secondary evidence to go in without objecting thereto, and afterward, on appeal, to make the objection for the first time, is a practice which, if tolerated, would work a gross injustice and a manifest surprise upon the opposite party.[11] This rule is true even under the statute of frauds. If a contract required to be in writing is in fact verbal, objection must be taken to the character of the proof offered to establish it, if the question is to be reviewed on appeal.[12] Other instances illustrative of the

8. Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720. See TRIAL.

9. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 466, 168 Pac. 1037 (hearsay evidence); Estate of Arnold, 147 Cal. 583, 591, 82 Pac. 252; Williams v. Hawley, 144 Cal. 97, 102, 77 Pac. 762 ("where incompetent evidence tending to prove a fact is admitted without objection, the question of its competency cannot be considered upon a specification that the evidence was insufficient to prove the fact"); Janson v. Brooks, 29 Cal. 214; Curiac v. Packard, 29 Cal. 194, 197; Goodale v. West, 5 Cal. 339; Walberg v. Underwood, 28 Cal. App. Dec. 351, 180 Pac. 55. And cases cited infra.

10. McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Frink v. Alsep, 49 Cal. 103; Mayo v. Mazeaux, 38 Cal. 442, 449; Goode v. Smith, 13 Cal. 81; Gille v. Anderson, 34 Cal. App. 237, 167 Pac. 193; United States v. Moreno, 68 U. S. 400, 17 L. Ed. 633.

11. Mayo v. Mazeaux, 38 Cal. 442, 449.

12. Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; McDonald v. Mission View Homestead Assn., 51 Cal. 210; Walberg v. Underwood, 28 Cal. App. Dec. 351, 180 Pac. 55.

rule include such objections as the following: That certain evidence is not admissible under the averments of the pleadings;[13] or that it is immaterial;[14] that parol testimony to vary the terms of a written instrument was admitted;[15] that a witness was incompetent;[16] that the offered testimony was hearsay and contained merely the conclusions of the witness;[17] that no foundation was laid for certain testimony;[18] that exhibits were not properly identified;[19] that a written instrument was admitted in evidence without proof of the signature;[20] that a written instrument had been altered;[1] that certain questions are not proper cross-examination;[2] and that testimony admissible only for a limited purpose, or as against a part only of several codefendants, was admitted generally.[3]

Furthermore, a party cannot on appeal for the first time object to questions put by the trial court;[4] or to

13. Mock v. Santa Rosa, 126 Cal. 330, 58 Pac. 826; Poledori v. Newman, 116 Cal. 375, 48 Pac. 325; People v. Keeley, 81 Cal. 210, 22 Pac. 593; In re Doyle, 73 Cal. 564, 15 Pac. 125; Henry v. Southern Pacific R. R. Co., 50 Cal. 176; Willson v. Truebody, 1 Cal. Unrep. 156; Ellsworth v. Middleton, 1 Cal. Unrep. 153.

14. Bliss v. Ellsworth, 36 Cal. 310.

15. Tebbs v. Weatherwax, 23 Cal. 58; McComish v. Kaufman (Cal. App.), 185 Pac. 476.

16. Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7; Bear River & A. W. & M. Co. v. Boles, 24 Cal. 359 (holding objection not made when disqualification of witness first appeared to be too late); O'Connor v. Hammond, 1 Cal. Unrep. 11; Walberg v. Underwood, 28 Cal. App. Dec. 351, 180 Pac. 55.

17. Estate of Bollinger, 170 Cal. 380, 149 Pac. 995; Knight v. Bentel, 39 Cal. App. 502, 179 Pac. 406.

18. Saecker v. Cohn, 180 Cal. 151, 179 Pac. 890, 180 Pac. 151; Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264, 273, 49 L. R. A. (N. S.) 737, 136 Pac. 544; Wolters v. Rossi, 126 Cal. 644, 650, 59 Pac. 143 (preliminary proof of deposition); Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 507, 158 Pac. 1041.

19. Toby v. Oregon Pacific R. R. Co., 98 Cal. 490, 33 Pac. 550.

20. Shain v. Sullivan, 106 Cal. 208, 210, 39 Pac. 606; Burnett v. Lyford, 93 Cal. 114, 117, 28 Pac. 855; Womble v. Wilbur, 3 Cal. App. 535, 546, 86 Pac. 916.

1. Davis v. Lamb, 5 Cal. Unrep. 765, 35 Pac. 306.

2. First Nat. Bank v. Jacoby, 137 Cal. 17, 69 Pac. 690.

3. Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258.

4. Hewlett v. Steele, 2 Cal. Unrep. 157.

the form of questions put by counsel;[5] or that hypothetical questions put to an expert witness are not based upon hypothesis consistent with the facts shown in the case;[6] or that the wording of a question placed certain facts before the jury, where counsel did not at the time ask the court to admonish the jury to disregard the implication of the question.[7]

§ 85. Specifying Grounds of Objection to Evidence.— While a trial court may sustain an objection or sustain a motion to strike out evidence upon any sufficient ground, although not specified by the party in whose favor the ruling is made, it is not required to do so.[8] Substantial justice requires that a party objecting to the admission of evidence should specify the particular ground of his objection, so that the party offering the testimony can meet the objection if possible, and let the case be tried on its merits.[9] Figuratively speaking, he must lay his finger on the point at the time,[10] unless the offered evidence be absolutely or manifestly incompetent.[11] And the rule obtains most particularly where the vice is a latent one. Hence, an appellate court will not, as a general rule, consider objections to the admission of evidence unless the ground of the objection is pointed out in definite and unequivocal language.[12]

5. Howland v. Oakland Consol. St. Ry. Co., 115 Cal. 487, 495, 47 Pac. 255; Healy v. Visalia & Tulare R. R. Co., 101 Cal. 585, 36 Pac. 125 (question put to expert witness).

6. Healy v. Visalia & Tulare R. R. Co., 101 Cal. 585, 36 Pac. 125.

7. Oakland v. Adams, 37 Cal. App. 614, 174 Pac. 947.

8. Spear v. United Railroads, 16 Cal. App. 637, 647, 117 Pac. 956.

9. Bundy v. Sierra Lumber Co., 149 Cal. 772, 776, 87 Pac. 622; Swan v. Thompson, 124 Cal. 193, 56 Pac. 878; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Examiner Printing Co. v. Aston, 238 Fed. 459, 472, 151 C. C. A. 395 (quoting Noonan v. Caledonia Mining Co., 121 U. S. 393, 400, 30 L. Ed. 1061, 7 Sup. Ct. Rep. 911, 915.

10. Brumley v. Flint, 87 Cal. 471, 25 Pac. 683; Cochran v. O'Keefe, 34 Cal. 554; Fabian & Co. v. Callahan, 56 Cal. 159, 161; Martin v. Travers, 12 Cal. 243.

11. Fabian & Co. v. Callahan, 56 Cal. 159.

12. In the Matter of Estate of Pusey, 180 Cal. 368, 181 Pac. 648;

Enlarging grounds of objection.—And as a party who urges particular grounds of objection is deemed to have waived all objections not specified, an appellant will not be allowed upon appeal to enlarge his grounds of objection, and urge new ones not presented or intimated in the trial court.[13]

Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Brumley v. Flint, 87 Cal. 471, 25 Pac. 683; Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330; Hughes v. Wheeler, 76 Cal. 230, 234, 18 Pac. 386; Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242; Steele v. Pacific Coast Ry. Co., 74 Cal. 323, 15 Pac. 851; Fabian & Co. v. Callahan, 56 Cal. 159; Winans v. Hassey, 48 Cal. 634; Carroll v. Benicia, 40 Cal. 386; Cochran v. O'Keefe, 34 Cal. 554, 558; Roberts v. Chan Tin Pen, 23 Cal. 259, 264; Dunning v. Rankin, 19 Cal. 640; Dreux v. Domec, 18 Cal. 83; Payne v. Treadwell, 16 Cal. 220, 241 (on petition for rehearing); McDonald v. Bear River & Auburn Water & M. Co., 13 Cal. 220, 236; Martin v. Travers, 12 Cal. 243; Kiler v. Kimball, 10 Cal. 267; Strong v. Patterson, 6 Cal. 156; Arthur v. Petaluma, 27 Cal. App. 782, 151 Pac. 183; Spear v. United Railroads, 16 Cal. App. 637, 647, 117 Pac. 956; Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 Pac. 85; Mushet v. Fox, 6 Cal. App. 77, 79, 91 Pac. 534; Examiner Printing Co. v. Aston, 238 Fed. 459, 472, 151 C. C. A. 395; Hamilton v. Southern Nevada G. & S. Min. Co., 33 Fed. 562, 567, 13 Sawy. 113 (citing Satterlee v. Bliss, 36 Cal. 489, 511; Cochran v. O'Keefe, 34 Cal. 554). And see cases cited supra.

13. Gibson v. McReynolds, 175 Cal. 263, 165 Pac. 921; Estate of Huston, 163 Cal. 166, 124 Pac. 852; Fagan v. Lentz, 156 Cal. 681, 690, 20 Ann. Cas. 221, 105 Pac. 951; Estate of Scott, 128 Cal. 57, 60 Pac. 527; Frank v. Pennie, 117 Cal. 254, 49 Pac. 208; Healy v. Visalia & Tulare R. R. Co., 101 Cal. 585, 592, 36 Pac. 125; Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; Brumley v. Flint, 87 Cal. 471, 25 Pac. 683; Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134; Bennett v. Green, 74 Cal. 425, 429, 16 Pac. 231; Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811; Estate of McCarty, 58 Cal. 335 (it cannot be objected for the first time on appeal that both witnesses to the will were not called on a contest); Board of Education v. Keenan, 55 Cal. 642; Roper v. McFadden, 48 Cal. 346; Mayo v. Mazeaux, 38 Cal. 442, 449; Clarke v. Huber, 25 Cal. 592, 593; Yaeger v. Southern California Ry. Co., 5 Cal. Unrep. 870, 51 Pac. 190; Thompson v. Koeller, 30 Cal. App. Dec. 582, 60 Cal. Dec. 167, 191 Pac. 927; Telander v. Tujunga Water & Power Co., 30 Cal. App. Dec. 148, 185 Pac. 504; Park v. Orbison, 29 Cal. App. Dec. 689, 184 Pac. 428; Starkweather v. Dawson, 14 Cal. App. 666, 112 Pac. 736; Sharples Separator Co. v. Skinner, 251 Fed. 25.

The general rule above set forth is equally applicable to motions to strike out evidence. The moving party must specify his objection with the same particularity that is required in pointing out an objection to a question. And, in like manner, if his motion is denied, he cannot on appeal urge other reasons not specified in the trial court why the motion should have been granted.[14]

§ 86. General Objection to Evidence.—It has often been held that a general objection to evidence as incompetent, irrelevant and immaterial, nothing more being stated, is too general to be considered on appeal, if, in any possible circumstances, the admitted testimony can be deemed competent, relevant or material.[15] The appellant should

14. Powley v. Swensen, 146 Cal. 471, 477, 80 Pac. 722; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Henry v. Southern Pacific R. R. Co., 50 Cal. 176; Sill v. Reese, 47 Cal. 294, 341; Spear v. United Railroads, 16 Cal. App. 637, 647, 117 Pac. 956.

15. Saecker v. Cohn, 180 Cal. 151, 179 Pac. 890; McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355; Estate of Bollinger, 170 Cal. 380, 149 Pac. 995; Furrey v. Lantz, 162 Cal. 397, 122 Pac. 1073 (whether a deed is sufficient to identify the land granted will not be considered, where the objection was general); Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703 (objection on appeal that evidence was secondary); Estate of Gregory, 133 Cal. 131, 138, 65 Pac. 315; McCarthy v. Phelan, 132 Cal. 404, 64 Pac. 570 (under general objection, party cannot urge specific objection that evidence of facts constituting a forfeiture of a mining location was inadmissible because the forfeiture was not pleaded); People v. Owens, 123 Cal. 482, 490, 56 Pac. 251; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; Howland v. Oakland C. St. Ry. Co., 115 Cal. 487, 495, 47 Pac. 255; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 520, 42 Pac. 983; Eachus v. Los Angeles Consol. Electric Ry. Co., 103 Cal. 614, 623, 42 Am. St. Rep. 149, 37 Pac. 750; Crocker v. Carpenter, 98 Cal. 418, 421, 33 Pac. 271; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382 (where counsel on appeal urged the special objection that the evidence was secondary); Steele v. Pacific Coast Ry. Co., 74 Cal. 323, 331, 15 Pac. 851 (where the objection was that question was "irrelevant and immaterial"); Thompson v. Thornton, 50 Cal. 142; Gardiner v. Schmaelzle, 47 Cal. 588; Braly v. Reese, 51 Cal. 447–465 (secondary evidence); Satterlee v. Bliss, 36 Cal. 489, 507; McDonald v. Bear River & Auburn Water & M. Co., 13 Cal. 220, 236; Strong v. Patterson, 6 Cal. 156; Fielding v. Iler, 39 Cal. App. 559, 179 Pac. 519; Arthur v. Petaluma, 27 Cal. App. 782, 151 Pac. 183;

point out the particular defect which rendered the question either incompetent, irrelevant or immaterial, that the objection could have been intelligently ruled upon, and, if necessary or proper, obviated;[16] a merely formal objection is not sufficient.[17] And in such case, the particular objection limits the general words, so that on appeal, in accordance with the rule already stated, objections not specified will not be considered by the appellate court.[18]

Upon the same principle, the appellate court will not consider objections in general terms that evidence is inadmissible,[19] or irrelevant,[20] or incompetent,[1] unless the evidence is inadmissible for any purpose and the difficulty cannot be obviated.[2]

Limitation of rule.—There is a well-established limitation to the general rule above stated, where the offered evidence is absolutely irrelevant and incompetent for any

Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258; French v. Atlas Milling Co., 17 Cal. App. 226, 119 Pac. 203; Carpenter v. Ashley, 15 Cal. App. 461, 469, 115 Pac. 268 (where it was urged on appeal that the question was "not cross-examination"); Nemo v. Farrington, 7 Cal. App. 443, 451, 94 Pac. 874, 877 (by supreme court in denying a rehearing); Union Savings Bank v. Rinaldo, 6 Cal. App. 637, 92 Pac. 873; Examiner Printing Co. v. Aston, 238 Fed. 459, 472, 151 C. C. A. 395 (quoting Sparf & Hansen v. United States, 156 U. S. 51, 57, 39 L. Ed. 343, 15 Sup. Ct. Rep. 273, 275); Aston v. Examiner Printing Co., 226 Fed. 496; Hamilton v. Southern Nevada G. & S. Min. Co., 33 Fed. 562, 567, 13 Sawy. 113. See Bakersfield & Ventura R. R. Co. v. Fairbanks, Morse & Co., 20 Cal. App. 412, 129 Pac. 610, where the objection was, "Counsel objects."

16. Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 Pac. 622; Lee v. Murphy, 119 Cal. 364, 367, 51 Pac. 549, 955; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 520, 42 Pac. 983; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Telander v. Tujunga Water & Power Co. (Cal. App.), 185 Pac. 504.

17. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 577, 74 Pac. 147; Colton Land & Water Co. v. Swartz, 99 Cal. 278, 284, 33 Pac. 878; Yaeger v. Southern California Ry. Co., 5 Cal. Unrep. 870, 51 Pac. 190.

18. Fagan v. Lentz, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951.

19. Burke v. Koch, 75 Cal. 357, 17 Pac. 228.

20. Owen v. Frink, 24 Cal. 171; Dreux v. Domec, 18 Cal. 83.

1. Nightingale v. Scannell, 18 Cal. 315, 324.

2. See supra, § 85.

purpose and the objection cannot be obviated even if it is stated. In such case, the question being objectionable from every standpoint, the court is not aided in making an intelligent ruling by a specific objection, and a general objection will not suffice. The reason of the rule failing, the rule itself fails.[3] More especial objections are required in certain cases, as where the question is formally defective, or the proper foundation has not been laid, or where, if the objection had been more specific, the other party might have obviated the difficulty by changing the form of the question, or by introducing other evidence, or by amending the complaint. But where the objection cannot be met no matter how specific, a specific objection is not necessary.[4]

As to hypothetical questions.—The same is true of the objection that a question is not a proper hypothetical question. Such an objection may refer to one of very many supposed reasons why the question was deemed proper.[5] An objection that a hypothetical question assumes the existence of conditions not shown by the evidence should point out the matter not pertinent to the case or which was not shown to be true.[6]

As to depositions.—A general objection to a deposition reaches the relevancy, competency or legal effect of the

3. Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672; Short v. Frink, 151 Cal. 83, 90 Pac. 200; Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 577, 74 Pac. 147; Morehouse v. Morehouse, 140 Cal. 88, 94, 73 Pac. 738 (where the purpose of the evidence is to prove a different contract from that alleged, a general objection is sufficient); Swan v. Thompson, 124 Cal. 193, 56 Pac. 878; Nightingale v. Scannell, 18 Cal. 315; Moody v. Peirano, 7 Cal. Unrep. 247, 251, 84 Pac. 783.

4. Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738. See Lemly v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671, 675 (where the supreme court in denying a hearing held that an objection "that the proper foundation had not been laid" fairly presented the question as to the expert qualifications of a witness).

5. Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 521, 42 Pac. 983.

6. Sharples Separator Co. v. Skinner, 251 Fed. 25, 163 C. C. A. 275.

testimony only. Objections to matters of form and to questions of regularity or authority in respect of taking a deposition must be specific.[7] And so it has been held that an objection that "no legal proceedings have been taken, that a deposition is without authority of law and is inadmissible, irrelevant and immaterial," is too general to raise the question as to irregularity in not naming a special commissioner.[8]

§ 87. **Exclusion of Evidence and Offer.**—It is a well-established rule that a party objecting to the admission of evidence must point out the particular reason why the proffered evidence is inadmissible, and that if his objection is overruled, he cannot on appeal urge other grounds why the evidence is inadmissible.[9] But a different rule obtains where the objection is sustained and the objecting party seeks to uphold the ruling on appeal. He is at liberty to suggest any ground that he may choose to show that the ruling of the trial court was correct, whether advanced in the discussions below or not.[10] The fact that a party has made an improper or insufficient objection in the court below does not preclude or estop him in the appellate court from justifying a ruling in his favor upon any other ground.[11] As the trial court need not wait for an objection, but may exclude evidence on its own motion, it follows that although the objection of the party may be improper or insufficient, the ruling of the court excluding the evidence will be upheld if there appears any reason for which the evidence should have been excluded, and which could not have been obviated on being stated.[12] If, however, the objection to the evidence might

7. Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242.

8. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

9. See supra, §§ 85, 86.

10. Clarke v. Huber, 25 Cal. 593, 598; Kidd v. Teepee, 22 Cal. 255; Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260.

11. Davey v. Southern Pacific Co., 116 Cal. 325, 330, 48 Pac. 117.

12. Miller & Lux v. Kern County Land Co., 140 Cal. 132, 138, 73 Pac. 836; Davey v. Southern Pacific Co.,

have been obviated if the ground of objection were pointed out, it is error for the court to sustain an objection made on an improper ground.[13]

Offer of proof and purpose of offer.—It often happens that the pertinence of a question is not obvious from its terms; in other words, it appears to be irrelevant until explained by counsel. In such case, the party seeking to introduce the evidence must, in order to present the question to the appellate court, make an offer of what he expects to prove, so that the court below and the appellate court can determine whether or not the proposed proof is material and pertinent. In the absence of such an offer, there will be nothing in the record on appeal to show the pertinency of the proposed testimony, or whether the party was prejudiced by the ruling. Non constat but that the evidence may have been wholly immaterial or irrelevant.[14]

Renewal of offer.—Where evidence is correctly excluded because not within the issues made by the pleadings, and the party obtains leave to amend his pleading so as to permit the evidence offered to be introduced, he must renew his attempt to get the evidence before the court, if he

116 Pac. 325, 48 Pac. 117; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Miller v. Van Tassel, 24 Cal. 459. See infra, § 515.

13. Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380 (holding that where the court grants a motion to strike as made, it must be presumed to have granted the motion on the ground stated).

14. Snowball v. Snowball, 164 Cal. 476, 129 Pac. 784; County of Sonoma v. Hall, 129 Cal. 659, 62 Pac. 213 (the appellate court cannot presume that the evidence was admissible for any purpose except such purpose as it can find in the record and the rational legal inferences therefrom); Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373 (where the offer was insufficient to show the materiality of the testimony); Bank of British Columbia v. Frese, 116 Cal. 9, 16, 47 Pac. 783; Taylor v. Kelly, 103 Cal. 178, 186, 37 Pac. 216; Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; Baird v. Duane, 1 Cal. Unrep. 492; Spangenberg v. Nesbitt, 22 Cal. App. 274, 281, 134 Pac. 343.

wishes to complain on appeal of the exclusion of the evidence.[15]

§ 88. **Dismissal and Nonsuit.**—The same consideration upon which it is required that a party objecting to the introduction of testimony should state precisely the grounds of his objection, is applicable where a motion for nonsuit is made at the trial. The defendant must call the attention of the plaintiff to the defect in his proof, so that he may obviate the objection by additional evidence, if he can;[16] or, in the event the nonsuit be ordered, that the ruling may afford a true and definite basis for the settlement of a bill of exceptions, and record for review.[17] Hence, it is the general rule, that an appellate court will not review a ruling of the trial court denying a motion for a nonsuit upon any ground not precisely and specifically stated in the motion;[18] and if no ground is sufficiently stated, it will not review it at all;[19] for where a motion for nonsuit is made without stating the grounds upon which it is made, it is not error to overrule the motion.[20] By moving for a nonsuit on stated grounds, a defendant thereby impliedly waives all others, and if his motion is denied, he cannot on appeal argue that the mo-

15. Risdon v. Yates, 145 Cal. 210, 78 Pac. 641.

16. See cases cited infra, this section; and see supra, § 85, as to the rule in considering objections to evidence.

17. Mateer v. Brown, 1 Cal. 231. See cases cited infra, in reference to granting of motion.

18. Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Millar v. Millar, 175 Cal. 797, L. R. A. 1918B, 415, 167 Pac. 394; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254; Shain v. Forbes, 82 Cal. 577, 22 Pac. 198; People ex rel. Dickenson v. Banyard, 27 Cal. 470; Breidenbach v. M. McCormick Co., 20 Cal. App. 184, 193, 128 Pac. 423, 21 Cal. App. 709, 132 Pac. 771; Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459.

19. Millar v. Millar, 175 Cal. 797, L. R. A. 1918B, 415, 167 Pac. 394; Holverstot v. Bugby, 13 Cal. 43; McGarrity v. Byington, 12 Cal. 426.

20. Durfee v. Seale, 139 Cal. 603, 73 Pac. 435; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Coffey v. Greenfield, 62 Cal. 602; Kiler v. Kimbal, 10 Cal. 267; Johnson v. Center, 4 Cal. App. 616, 88 Pac. 727.

tion should have been granted on some ground not specified.[1]

Where motion is granted.—The rule seems to be established that the respondent cannot on appeal urge other grounds not pointed out below in support of an order granting a nonsuit, but that the appellate court will consider only the grounds specified in the motion, and will set aside the order if it finds none of them well taken. It has been held that this is the rule, although other grounds appearing in the record, but not specified in the motion, might have warranted the order.[2] There are, however, certain decisions and dicta to the effect that an order granting a nonsuit may be sustained even upon grounds not stated in the motion.[3] It has been said that

1. Miller v. Wade, 87 Cal. 411, 25 Pac. 487; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264; Sanchez v. Neary, 41 Cal. 485; Baker v. Joseph, 16 Cal. 173, 180; Holverstot v. Bugby, 13 Cal. 43; Mateer v. Brown, 1 Cal. 231.

2. Glidden v. Diamond 66 Cattle & Dairy Co., 178 Cal. 562, 174 Pac. 667; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 Pac. 322 (the amendment of section 581, Code of Civil Procedure 1907, has worked no change in the uniform law of this state that the party moving for a nonsuit must state in his motion precisely the grounds upon which he relies); Harper v. Gordon, 128 Cal. 489, 61 Pac. 84; Palmer & Rey v. Marysville Democrat Publishing Co., 90 Cal. 168, 27 Pac. 21; Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198; Raimond v. Eldridge, 43 Cal. 506 (where a nonsuit is granted upon a motion pointing out particular insufficiencies in the opening statement, the defendant cannot, on appeal, raise the point that the statement was otherwise insufficient); De Leonis v. Hammel, 1 Cal. App. 390, 396, 82 Pac. 349.

3. Gilliam v. Brown, 126 Cal. 160, 162, 58 Pac. 466 (where the court says by way of dictum: "Of course, if the record showed any other valid ground for the nonsuit, the order granting it would be maintained here, although such ground was not stated in the motion for nonsuit; but no such other ground appears"); Miller v. Wade, 87 Cal. 410, 25 Pac. 487 (upholding a judgment of nonsuit though the record does not show the grounds upon which the motion was made or that any grounds were assigned. The evidence of the plaintiff was, however, entirely insufficient to put the defendant on his proof, and it seems that it is on this ground rather than the former that the majority of the court concurred); Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518 (citing Miller v. Wade, 87 Cal. 410, 25 Pac. 487, and Davey

it would be obviously unjust to the plaintiff in such cases to permit the defendant who has moved for a nonsuit upon insufficient grounds to urge in support of the order of nonsuit objections which might have been obviated if pointed out at the time the motion was made.[4]

Where reason of rule does not apply.—Since the reason of the rule is to afford an opportunity to correct such defects as admit of correction, it is plain that this reason, and therefore the rule itself, does not apply where the defects do not admit of correction, as where the defect is inherent in the cause of action. In other words, in such a case the error in granting the motion where the defects are not specified is immaterial.[5] Again, when a party resists a motion to dismiss on certain grounds, he cannot on appeal from an order granting the motion urge other reasons why the motion should have been denied. The trial court may properly assume that the grounds urged before it are the only grounds upon which the motion is opposed, and act accordingly.[6]

§ 89. Variance and Trial.—The general rule requiring objections to be made in the trial court as a prerequisite to review on appeal, applies to the question of variance and the proceedings at the trial. Where the findings and

v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117, and holding that the action of the court in granting a nonsuit will be upheld if it can be justified upon any ground, whether made a ground of the motion or not. The Davey case, it will be noted, does not relate to an order of nonsuit, but to an order rejecting testimony).

4. Estate of Higgins, 156 Cal. 257, 104 Pac. 6.

5. Estate of Higgins, 156 Cal. 257, 104 Pac. 6 (where the evidence has been fully presented, and the plaintiff has totally failed to make out a case which would support findings in his favor, and there is no reason to believe that additional evidence can be produced, no substantial benefit would be derived from a formal motion of nonsuit, based on the insufficiency of the evidence); Warner v. Warner, 144 Cal. 615, 78 Pac. 24; Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580; Daley v. Russ, 86 Cal. 114, 117, 24 Pac. 867.

6. In re Garcelon, 104 Cal. 570, 582, 43 Am. St. Rep. 134, 32 L. R. A. 595, 38 Pac. 414.

judgment are supported by the evidence and it appears that the case was decided correctly on the merits, objections to a variance between the complaint and the proof which might have been obviated by an amendment of the complaint cannot be urged for the first time on appeal.[7] And this is true even though the variance is of a substantial nature.[8] An objection to evidence on the ground that it is incompetent, irrelevant and immaterial in that it does not support the allegation of the complaint is not sufficient to raise the question of variance.[9]

Questions relating to conduct of trial.—A party cannot object for the first time on appeal that an action at law was not tried by a jury;[10] or, on the other hand, that an action or cause of action not triable by jury was so tried.[11] Respecting omissions to give instructions, an ap-

7. Sormano v. Wood, 179 Cal. 102, 175 Pac. 451; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Colfax Fruit Co. v. Southern Pacific Co., 118 Cal. 648, 40 L. R. A. 78, 50 Pac. 775; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; Knox v. Higby, 76 Cal. 264, 18 Pac. 381; Yik Hon v. Spring Valley Water Wks., 65 Cal. 619, 4 Pac. 666; Bell v. Knowles, 45 Cal. 193; Dikeman v. Norrie, 36 Cal. 94, 103; Boyce v. California Stage Co., 25 Cal. 460; Marshall v. Ferguson, 23 Cal. 65, 70; Delafield v. San Francisco & S. M. Ry. Co., 5 Cal. Unrep. 71, 40 Pac. 958; Dahne v. Dahne (Cal. App.), 193 Pac. 785; Shelton v. Michael, 31 Cal. App. 328, 160 Pac. 578; Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692; Stover v. Stevens, 21 Cal. App. 261, 131 Pac. 332; Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Union Collection Co. v. Rogers, 18 Cal. App. 205, 122 Pac. 970; Brandt v. Salomonson, 17 Cal. App. 395, 119 Pac. 946; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113; Cargnani v. Cargnani, 16 Cal. App. 96, 101, 116 Pac. 306; Lacy Mfg. Co. v. Los Angeles Gas & Electric Co., 12 Cal. App. 37, 106 Pac. 413; Sheppard v. Newhall, 54 Fed. 306, 4 C. C. A. 352.

8. Sormano v. Wood, 179 Cal. 102, 175 Pac. 451.

9. Knox v. Higby, 76 Cal. 264, 18 Pac. 381.

10. Smith v. Brannan, 13 Cal. 107, 115.

11. Estate of Kilborn, 158 Cal. 593, 112 Pac. 52 (that a will contest was tried by jury cannot be objected to for the first time on appeal); Garvey v. Lashells, 151 Cal. 526, 91 Pac. 498 (an objection that one of the counts in the complaint states an equitable cause of action and should not be tried by a jury cannot be urged for the first time

pellant cannot on appeal take advantage of the trial court's failure to give some specific instruction, if he presented no such instruction to the court.[12] Failing to do so, there is no ruling by the trial court, and hence there can be no exception and no consideration of an exception upon appeal.[13] Accordingly, a party cannot object on appeal that certain instructions, though correct in general, are not sufficiently explicit and specific as to the theory of the appellant. The party desiring to have an instruction more specific should request an instruction on that point.[14]

Mere irregularities, unobjected to on the trial, cannot avail on appeal. Hence, it has been held, that while equitable defenses interposed in an action at law should be first passed upon by the court, any irregularity in submitting them to the jury with the legal defenses cannot be objected to for the first time on appeal.[15] And, for like reason, the objection that a portion of the testimony was re-read before the retirement of the jury cannot be urged for the first time on appeal.[16]

on appeal); Baker v. Joseph, 16 Cal. 173 (where one of the counts was in equity).

12. Wirthman v. Isenstein (Cal.), 187 Pac. 12; Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760; O'Connor v. United Railroads, 168 Cal. 43, 141 Pac. 809; Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993; Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098; Wyatt v. Pacific Electric Ry. Co., 156 Cal. 170, 103 Pac. 892; Castagnino v. Balletta, 82 Cal. 250, 262, 23 Pac. 127; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Weinburg v. Somps, 4 Cal. Unrep. 10, 33 Pac. 341; Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342; Freiburg v. Israel (Cal. App.), 187 Pac. 130; Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323; Donati v. Righetti, 9 Cal. App. 45, 97 Pac. 1128. See TRIAL.

13. Castagnino v. Balletta, 82 Cal. 250, 262, 23 Pac. 127.

14. Gomez v. Scanlan, 155 Cal. 528, 532, 102 Pac. 12; Scott v. Wood, 81 Cal. 398, 406, 22 Pac. 871; Viera v. Atchison, Topeka & Santa Fe Ry. Co., 10 Cal. App. 267, 101 Pac. 690; Crowley v. Strouse, 4 Cal. Unrep. 29, 33 Pac. 456.

15. Tormey v. Pierce, 42 Cal. 335; Lestrade v. Barth, 19 Cal. 660, 671; Diggs v. Porteus, 3 Cal. Unrep. 753, 33 Pac. 447 (where legal and equitable issues on a summary proceeding for unlawful detainer were tried together).

16. Hardy v. Schirmer, 163 Cal. 272, 275, 124 Pac. 993.

§ 90. Misconduct.—As the effect of misconduct of counsel can ordinarily be removed by an instruction to the jury to disregard it, it is essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give that court an opportunity to so act in the premises as, if possible, to avoid the error and prevent a mistrial. It is insufficient merely to "except" to the improper remarks of counsel;[17] the party should ask the court to instruct the jury to disregard the supposed misconduct.[18] Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof.[19]

On the same principle, a party cannot object for the first time on appeal to remarks of the trial judge;[20] or to his temporary absence from the courtroom;[1] or to the misconduct of a witness, of such a nature that all prejudicial effect can be obviated by a proper instruction and admonition to the jury.[2]

Misconduct of the jury known to a party at the time of its occurrence cannot be objected to for the first time on appeal. A party cannot remain quiet and take the chance of a favorable verdict, and then, if the verdict is unfavorable, raise the objection on appeal.[3]

17. Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83.

18. Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687 (citing People v. Shears, 133 Cal. 154, 159, 65 Pac. 295; People v. Mancuso, 23 Cal. App. 146, 137 Pac. 278; People v. Wing, 23 Cal. App. 53, 137 Pac. 48); Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83; Morgan v. Hugg, 5 Cal. 409.

19. Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672; Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687; Morgan v. Hugg, 5 Cal. 409. See TRIAL.

20. Price v. Northern Electric Ry. Co., 168 Cal. 173, 182, 142 Pac. 91; Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745.

1. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

2. Brinck v. Bradbury, 179 Cal. 376, 176 Pac. 690.

3. Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060; Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190, 194, 22 Pac. 590.

§ 91. Findings, Verdict and Report of Referee.—If the verdict returned is informal, it is the duty of the aggrieved party to point out the defect before the verdict is received and recorded. If he fails to do so, it is only just that he should be precluded from complaining on appeal of the form of the verdict.[4] As a general rule, a party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect.[5] Hence, a party cannot object for the first time on appeal as to the form of special interrogatories to the jury;[6] or that the answers of the jury to special issues submitted to them are indefinite and not sufficiently specific;[7] or where, not having requested that forms of verdict be given to the jury, that the court did not do so;[8] or that a verdict was not declared by the foreman, or, in the case of a sealed verdict, read by the clerk, before it was recorded.[9]

A verdict may, however, be so defective as to be subject to subsequent attack, although no objection be made at the time of its rendition. If there is no finding at all upon an issue, it is no verdict at all as to such issue. The failure of the plaintiff to call for a correction of the ver-

4. Johnson v. Visher, 96 Cal. 310, 31 Pac. 106; Ryan v. Fitzgerald, 87 Cal. 345, 25 Pac. 546; Alhambra Water Co. v. Richardson, 72 Cal. 598, 609, 14 Pac. 379; Campbell v. Jones, 41 Cal. 515; Hicks v. Coleman, 25 Cal. 122, 146, 85 Am. Dec. 103 (an objection that the verdict is joint cannot be urged for the first time on appeal, especially where no damages are awarded and no injury results from the error); Mahoney v. Van Winkle, 21 Cal. 552, 576; Algier v. Steamer Maria, 14 Cal. 167; Douglass v. Kraft, 9 Cal. 562; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 663, 128 Pac. 9, 18. See VERDICT.

5. Johnson v. Visher, 96 Cal. 310, 31 Pac. 106.

6. Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds, 16 Cal. App. 461, 469, 118 Pac. 469.

7. Shaw v. Shaw, 160 Cal. 733, 117 Pac. 1048.

8. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496, on the authority of Foley v. Martin, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842, and Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672.

9. Blum v. Pate, 20 Cal. 69.

dict in such a case does not raise a presumption that the issue had been abandoned on the trial.[10]

Findings.—Similar rules apply to the findings of the court. A party cannot object for the first time on appeal to defects of form in the findings, and will not, therefore, be heard to urge that a finding is in reality a conclusion of law;[11] or that the findings are not sufficiently explicit;[12] or that there is a conflict in the findings.[13] And, as has already been seen, where the parties treat certain matters as within the issues and proceed to trial upon that theory, they will not be permitted to urge that a finding thereon is outside the issues made by the pleadings.[14]

Since it is the duty of the court to find upon all the material issues, regardless of any request of the parties, and a failure in that respect is a ground of new trial to the party aggrieved as a decision against law,[15] it has been held that a failure to object to evidence, or to move for a nonsuit, or to request specific findings, does not pre-

10. Rankin v. Central Pacific R. R. Co., 73 Cal. 93, 15 Pac. 57 (where in an action against joint tort-feasors in which the defendants answer separately, the verdict finds against one of the defendants and is silent as to the other).

11. Estate of Bollinger, 170 Cal. 380, 149 Pac. 995.

12. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Parke v. Hinds, 14 Cal. 415.

13. Hammond Lumber Co. v. Fanta, 178 Cal. 652, 178 Pac. 503.

14. Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Daniels v. Gualala Mill Co., 77 Cal. 300, 19 Pac. 519; Moore v. Campbell, 72 Cal. 251, 13 Pac. 689. See supra, § 69.

15. Haight v. Tryon, 112 Cal. 6, 44 Pac. 318; Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306. See Code Civ. Proc., § 632 et seq. And generally, see NEW TRIAL; TRIAL.

Under the procedure prior to the adoption of the code, it was the rule that no judgment should be reversed on appeal for want of a finding at the instance of any party who, at the time of the submission of the cause, had not requested a finding in writing, and had such request entered in the minutes of the court. Stats. 1865–66, p. 843; Lucas v. City of San Francisco, 28 Cal. 591; Calderwood v. Brooks, 28 Cal. 151, 155; Marshall v. Ferguson, 23 Cal. 65, 70. See Lamb v. Harbaugh, 105 Cal. 680, 693, 39 Pac. 56, where it is stated that this procedure ceased to be operative when the code came into operation in 1873.

clude an appellant from attacking a finding on the ground of the insufficiency of the evidence to sustain it.[16]

References.—A party cannot object to a referee's report for the first time on appeal. The report of a referee should be taken advantage of in the trial court by filing written objections to the entry of judgment thereon or by a motion for a new trial setting forth the grounds of the alleged error.[17] Where a reference to ascertain a fact to enable the court to determine an action or proceeding is had, the objection should be raised before the court approves, and adopts the finding of that officer into its own findings. In the absence of such an objection, it will be assumed that there was no error.[18]

§ 92. Judgment, Execution and Costs.—Clerical errors in the judgment should be corrected in the trial court on motion to correct the error, instead of raising the point for the first time on appeal.[19] It has been held, though, that in a case where the error in the computation of interest is apparent upon the record, the appellate court

16. First Nat. Bank v. Maryland Casualty Co., 162 Cal. 61, 72 Ann. Cas. 1913C, 1170, 121 Pac. 321. See infra, § 92, as to manner of raising question as to whether conclusions of law are supported by the evidence.

17. Clark, Wise & Co. v. Hauschlidt, 28 Cal. App. 47, 151 Pac. 149 (holding that an objection that the report, findings and conclusions of referee are not sustained by the evidence and that the report goes beyond the order of reference cannot be made on appeal for the first time). Gronfier, Jeune & Co. v. Minturn, 5 Cal. 492; Guy v. Franklin, 5 Cal. 416; Porter v. Barling, 2 Cal. 73; Inches v. Van Valkenburgh, 1 Cal. Unrep. 81. But see Gunter v. Sanchez, 1 Cal. 45, 48, where, under the early practice, it was held (Hastings, C. J., dissenting), that though, according to strict practice, a motion in the court below to set aside the report of the referee is necessary before a cause can be taken to an appellate court, a failure to make such a motion is but a defect, error or imperfection not affecting the merits, which the court, under the statute, is authorized to overlook.

18. Doudell v. Shoo, 20 Cal. App. 424, 447, 129 Pac. 478, 487. See ACCOUNTS AND ACCOUNTING, vol. 1, p. 188; and REFERENCE.

19. Whitney v. Buckman, 13 Cal. 536 (error in computation of interest); First Nat. Bank v. Kowalsky, 3 Cal. Unrep. 759, 31 Pac. 1133.

has authority to correct it in the judgment; but an appeal for this cause alone is trivial, and where this is the only point raised, the court will award damages for a frivolous appeal.[20]

One may appeal from a default judgment rendered against him upon defective service without moving to set aside the default or other proceedings in the court below.[1] So, also, where an order sustaining a demurrer to a complaint contains an order refusing leave to amend, the order is deemed excepted to, and it is not necessary for the plaintiff to move to vacate or modify it in order to have the point reviewed on appeal whether or not the court abused its discretion.[2]

Grounds for staying execution of a judgment, other than the taking of an appeal, cannot be urged upon motion in the appellate court, but should first be presented in the trial court, and brought to the appellate court, if at all, upon appeal from the order of the trial court.[3]

Vacation of judgment not supported by conclusions of law.—In order to raise the question on appeal whether certain conclusions of law are supported by the findings, a party may proceed under the provisions of sections 663 and 663a of the Code of Civil Procedure, and move for a vacation of the judgment rendered and for a correction of the conclusions of law and entry of the proper judgment.[4] If aggrieved, he may appeal from the order denying his motion.[5] This remedy is not exclusive, however, and does not affect or supersede the remedy by appeal

20. Rountree v. I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16; Tryon v. Sutton, 13 Cal. 490.

1. Howard v. Galloway, 60 Cal. 10 (holding that Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490, and cases following it, are virtually overruled by Hallock v. Jaudin, 34 Cal. 167).

2. Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

3. Swasey v. Adair, 88 Cal. 203, 26 Pac. 83.

4. Cameron v. Ah Quong, 175 Cal. 377, 386, 165 Pac. 961; Patch v. Miller, 125 Cal. 240, 57 Pac. 986; Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72.

5. See supra, § 34.

from the final judgment, for it is well settled that the question as to the inconsistency between the findings and judgment may be reviewed upon such appeal.[6]

Writs, orders of sale, etc.—It has been held that a party cannot for the first time on appeal object to the issuance of a writ of assistance, on the ground that the amount in the judgment was left blank, as such objection could have been obviated by an amendment nunc pro tunc, had objection been made below.[7] And it seems that any irregularity in the fact that an order of sale of mortgaged premises addressed to the sheriff is executed by a commissioner must be raised by motion to vacate the sale, and cannot be raised for the first time on appeal.[8] Where, in an order of sale, the record contains all the data necessary to correct the error, it is said that there is no necessity for an appeal to correct such error, at least until after a denial of a motion for that purpose by the trial court.[9]

Costs.—Questions relating to the taxation of costs cannot be raised for the first time on appeal. The party complaining must move in the trial court to retax, and thus obtain distinctly the judgment of the court of original jurisdiction upon the disputed items before resort can be had to a higher tribunal.[10]

6. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700; Patch v. Miller, 125 Cal. 240, 57 Pac. 986; Modoc Co-operative Assn. v. Porter, 11 Cal. App. 270, 104 Pac. 710. See infra, § 481.

7. Gordon v. Clark, 22 Cal. 533.

8. Taylor v. Ellenberger, 6 Cal. Unrep. 725, 65 Pac. 832, opinion in department. (For opinion in Bank, see 134 Cal. 31, 66 Pac. 4; and for a former appeal of this case, see 128 Cal. 411, 60 Pac. 1034.) See Turner v. Billagram, 2 Cal. 520 (holding that a party cannot object for the first time on appeal to the nonexistence of the facts authorizing the appointment of an elisor or substitute sheriff).

9. Newton v. Hull, 90 Cal. 487, 27 Pac. 429.

10. First Nat. Bank v. Holt, 87 Cal. 158, 162, 25 Pac. 272 (holding it cannot be objected for the first time on appeal that the trial court without authority added a percentage to costs and disbursements); Muir v. Meredith, 82 Cal. 19, 23, 22 Pac. 1080; Stoddard v. Treadwell, 29 Cal. 281; Guy v. Franklin, 5 Cal. 416.

§ 93. Orders on Motion for a New Trial.—Where a motion for a new trial is granted and the record on appeal does not show that any objection was made in the court below, the appellant cannot urge for the first time on appeal that the notice of motion was defective in not setting forth the grounds of the motion. If the objection had been made, the court may have allowed an amendment, or the parties may have waived the objection. Error will not be presumed and the burden is on the appellant to show error by the record.[11]

When the right to extend the time in which to give notice of intention existed, the parties could not raise the objection for the first time on appeal that the notice was served too late.[12] So, also, under the former practice, a failure of the adverse party to interpose objections to the proposed statement, or to the hearing of the motion and the proposal of amendments without objection, constituted a waiver of defects in the proceedings precluding the respondent from urging them as reasons for affirming an order denying the motion, or for disregarding the statement.[13] This rule was held applicable also where the motion was heard on a bill of exceptions,[14] although there is authority to the contrary.[15] And where a bill of

11. Brady v. O'Brien, 23 Cal. 244.

12. Brichman v. Ross, 67 Cal. 601, 8 Pac. 316; Patrick v. Morse, 64 Cal. 462, 2 Pac. 49. For the present rule see Code Civ. Proc., § 659, providing that the time for giving notice of intention to move for a new trial specified in this section "shall not be extended by order or stipulation."

13. Christy v. Spring Valley Water Works, 68 Cal. 73, 8 Pac. 849 (where the only notice given was filed before the filing of the findings of fact and conclusions of law); Brichman v. Ross, 67 Cal. 601, 8 Pac. 316 (where the notice of intention was not given in time); Savings & Loan Society v. Moore, 68 Cal. 156, 8 Pac. 824 (where the motion was heard upon a statement instead of on affidavits as prescribed by the code and as stated in the notice of motion); Hodgdon v. Griffin, 56 Cal. 610 (where the statement was made too late); Hill v. Gwinn, 1 Cal. Unrep. 882 (where the notice of intention was not given in time).

14. Hegard v. California Ins. Co., 72 Cal. 535, 14 Pac. 180, 359; Mendocino County v. Peters, 2 Cal. App. 24, 82 Pac. 1122.

15. Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027 (holding that a defect in the notice of motion for a new trial in not stating upon what the motion would be based is not

exceptions on motion for new trial contains affidavits, and counsel stipulates that the bill may be settled saving the objection that the affidavits were unauthorized, the objection cannot be considered on appeal if not urged at the settlement of the bill or at the hearing of the motion.[16] The objection must point out the grounds thereof, although no particular form of reserving the exception is prescribed. It is enough that it is pointed out as an objection upon which the party intends to rely in resisting the motion.[17]

When there was a failure to serve an adverse party who did not participate in the hearing, the rule is that since the failure to serve all parties to the issue involves a jurisdictional defect, the objection is available at any time and in any court in which the cause may be pending.[18]

Rule applied.—Other instances where the rule that a party cannot object for the first time on appeal has been held applicable, include the following: That certain matters were improperly presented by affidavit;[19] that the bill of exceptions was not filed in time;[20] that no notice of the settlement was given;[1] or that the notice of motion for a new trial was improperly served on an associate counsel.[2]

waived by the proposal of amendments or by participation in the settlement of the bill).

16. Anderson v. Anderson, 4 Cal. App. 269, 87 Pac. 558.

17. Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114 (as to sufficiency of objection to settlement of statement); Cottle v. Leitch, 43 Cal. 320, holding a phrase, "without waiving any right to move to deny said motion on the ground that defendant's statement was not filed in time," while inartificial, is substantially a reservation of the objection that the statement came too late); Perry v. Noonan Loan Co., 1 Cal. App. 609, 82 Pac. 623 (objection to settlement of statement).

18. Marshall-Stearns Co. v. Deneen Bldg. Co., 169 Cal. 229, 146 Pac. 684. See NEW TRIAL as to waiver of notice.

19. Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742.

20. Lantz v. Cole, 172 Cal. 245, 156 Pac. 45; Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751.

1. Horton v. Jack, 115 Cal. 29, 46 Pac. 920.

And especially is this the rule where the party has stipulated that the bill was true and correct; Estate of Dougherty, 139 Cal. 14, 72 Pac. 357; Hodgdon v. Griffin, 56 Cal. 610.

2. Sowden v. Idaho Quartz M. Co., 55 Cal. 443, 452.

§ 94. Necessity of Ruling on Objection.—Not only is it necessary that the party object, but it is also necessary that it appear that the objection was ruled on by the court.[3] If no ruling upon an objection is shown, the inference arises that it was withdrawn, and there is nothing to be reviewed.[4]

Ruling on demurrer.—If a demurrer is interposed, it is the duty of the demurrant to see that it is ruled on. If he fails to call the court's attention to it in any way, and allows the case to be tried without a ruling thereon, he is deemed to have waived his demurrer.[5] If the demurrer is not ruled upon, the appellate court will not consider an objection to evidence,[6] or an offer of evidence.[7] The ruling need not necessarily be a formal one. There is a sufficient ruling where on an objection to evidence the court states the issue to be tried, and counsel refrains from introducing further evidence along the lines excluded by the court.[8] The code provides that an order sustaining or overruling a demurrer is deemed to have been excepted to.[9]

3. Smith v. Smith, 163 Cal. 630, 126 Pac. 475 (holding that no alleged errors at law can be passed on where the bill of exceptions fails to indicate any ruling of the court or exception thereto); People v. Parrott, 1 Cal. Unrep. 412; Kellogg v. Crippen, 1 Cal. Unrep. 161.

4. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336. See infra, § 95 et seq., as to exceptions to rulings.

5. Silcox v. Lang, 78 Cal. 118, 20 Pac. 297; McCarthy v. Yale, 39 Cal. 585; De Leon v. Higuera, 15 Cal. 483 (it is too late to object on appeal that the demurrer was not formally disposed of); Diamond Coal Co. v. Cook, 6 Cal. Unrep. 446, 61 Pac. 578.

6. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336; Smith v. Smith, 163 Cal. 630, 126 Pac. 475.

7. Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94.

8. San Joaquin Light & Power Co. v. Barlow (Cal. App.), 184 Pac. 899.

9. See infra, §§ 95–97; and see Code Civ. Proc., § 647.

III. EXCEPTIONS.

§ 95. In General.—An exception is defined by the code to be

"An objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding."[10]

It is a formal protest against the ruling of the court upon a question of law,[11] and apprises the trial court that its ruling is challenged, and thereby enables it to reconsider its ruling and correct the error, if it be such.[12]

The office of a ruling is to cause the question of law, which was presented to and decided by the court or other tribunal, to be made a matter of record, so that it may be re-examined by the court upon a motion for a new trial or be reviewed by the appellate court.[13] Therefore, in order that errors be reviewed upon appeal, it is not sufficient merely to interpose an objection and obtain a ruling thereon; it is also necessary to take an exception to the ruling,[14] at the time the decision is

10. Code Civ. Proc., § 646 (in part); Raymond v. Glover, 122 Cal. 471, 55 Pac. 398; Estate of Page, 57 Cal. 238.

The Practice Act defined an exception to be "an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision." Practice Act, § 188; Stats. 1850–53, p. 553 (in part); Matter of Will of Bowen, 34 Cal. 682.

11. People v. Torres, 38 Cal. 141.

12. Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692.

13. Smith v. Lawrence, 38 Cal. 24, 99 Am. Dec. 344. See infra, § 266 et seq., as to bill of exceptions.

14. Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132; Grazidal v. Bastanchure, 47 Cal. 167; Wilkinson v. Parrott, 32 Cal. 102; Smith v. Curtis, 7 Cal. 584 (holding, under the Practice Act, that an order overruling a motion to set aside the judgment and quash the execution must be excepted to). See Lamet v. Miller, 2 Cal. Unrep. 679, 11 Pac. 744 (decided before the amendment to section 647 of the

made,[15] unless the ruling is enumerated in the code as one which is deemed excepted to, or unless it is a matter of record.[16] As to all rulings not deemed excepted to under the code, if no exception was taken, or if the exception was taken too late, the objection made is deemed to have been waived, and the ruling of the court to have been acquiesced in.[17] And as an appellate court will not review consent orders, it will not concern itself with the questions raised, even though the respondent does not raise the question that no exception was taken.[18]

Code of Civil Procedure in 1909, and holding that an order granting a motion for judgment on the pleadings must be excepted to unless made in the absence of the party); Hewlett v. Steele, 2 Cal. Unrep. 157; Kellogg v. Crippen, 1 Cal. Unrep. 161; Southern Pac. Co. v. Stephany, 255 Fed. 679, 680 ("We can consider only the rulings of the trial court to which exceptions were duly taken").

It has been held that the fact that the trial was conducted by a person not versed in the law can afford no ground for disregarding the want of exceptions where necessary. Randall v. Freed, 154 Cal. 299, 97 Pac. 669.

15. Code Civ. Proc., § 646; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413; Brown v. Kentfield, 50 Cal. 129. See St. John v. Kidd, 26 Cal. 263 (while the Practice Act did not fix the time when the exception should be taken, it implied that it should be taken at the time the ruling was made, that is to say, before any further steps were taken or progress made in the trial, and in time to enable the opposite party or the court to remedy the objection, if it be deemed a substantial one).

An exception to instruction, formerly required, must have been taken before the jury retired, in order that the judge might have an opportunity to correct any error he may have inadvertently fallen into. Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413; Mallett v. Swain, 56 Cal. 171; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Miller & Lux v. Petrocelli, 236 Fed. 846, 150 C. C. A. 108. See infra, this section, as to when exceptions to rulings by referee are to be taken.

16. See infra, § 96.

17. Lee v. Murphy, 119 Cal. 864, 51 Pac. 549, 955; Williams v. Southern Pacific R. R. Co., 110 Cal. 457, 42 Pac. 974; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413 (exception too late); Mallett v. Swain, 56 Cal. 171 (exception too late); Turner v. Tuolumne County Water Co., 25 Cal. 397; Baird v. Duane, 1 Cal. Unrep. 492; Exposito v. United Railroads (Cal. App.), 183 Pac. 576; Davies v. Ramsdell, 40 Cal. App. 424, 181 Pac. 94.

18. Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692.

As has been intimated, the exception when taken is to the decision or ruling of the trial court or other judicial officer. A party cannot except to testimony introduced, but only to the ruling of the court upon an objection to its admissibility.[19]

When exceptions to rulings of referee are to be taken.—The code provides that the findings of a referee or commissioner may be excepted to and reviewed in like manner as if made by the court;[20] and there was a similar provision in the Practice Act.[1] The clear meaning of this, says an early case, is that exceptions must be taken to the rulings of the referee during the progress of the trial in the same manner as they are taken before a court; and then such exceptions must be embodied in the report of the referee, or made a part of his report by being propertly certified to him.[2]

§ 96. Rule as to Rulings Deemed Excepted to.—The Practice Act did not, as does our code, contain an enumeration of orders which were deemed excepted to. But even under that act it was settled that an exception was not necessary where the error in question appeared on the record. This purpose of an exception being to cause the question of law presented to the court to be made a matter of record, no useful purpose would be subserved by making the ruling a matter of record a second time by exception, if it already appeared of record, and was reviewable without a bill of exceptions or state-

19. Raymond v. Glover, 122 Cal. 471, 55 Pac. 398. See infra, § 97.

20. Code Civ. Proc., § 645.

1. See Headley v. Reed, 2 Cal. 322 (under section 191 of the Practice Act, the report of the referee was deemed excepted to if not made immediately after the close of the testimony).

2. Tyson v. Wells, 2 Cal. 122, followed in Phelps v. Peabody, 7 Cal. 50. See Branger v. Chevalier, 9 Cal. 353, holding when the referee excludes proper testimony or admits improper evidence, or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report.

ment.[3] The code dispenses with the necessity of taking exceptions in a number of cases by specifying certain rulings deemed excepted to. The provision reads as follows:

"The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon ex parte application, giving an instruction, although no objection to such instruction was made, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party, or an order granting or denying a nonsuit, or a motion to strike out evidence or testimony and a ruling sustaining or overruling an objection to evidence, are deemed to have been excepted to."[4]

It is well settled that the necessity for taking an exception is determined by the law in existence at the time of the trial, and not at the time of the appeal. If a case is tried while there is a statute requiring exceptions to be taken, the subsequent repeal of the statute does not authorize the review on appeal of objections or errors not excepted to at the trial.[5]

Particular rulings.—Because they are not included in the enumeration in the code of rulings deemed excepted to, exceptions must be taken to such orders as the following to permit of a review on appeal: An order substituting parties;[6] or denying a motion to be permitted to inter-

3. Smith v. Lawrence, 38 Cal. 24, 99 Am. Dec. 344 (holding that where a party stands by a pleading to which a demurrer has been sustained, no exception to the decision is required. Overruling on this point, Bostwick v. McCorkle, 22 Cal. 669).

4. Code Civ. Proc., § 647 (amendment 1909; Stats. 1909, p. 586).

5. Randall v. Freed, 154 Cal. 299, 97 Pac. 669; Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787; Fleischhauer v. Fabens, 8 Cal. App. 30, 96 Pac. 17.

6. Gates v. Salmon, 46 Cal. 361.

vene;[7] an order directing the withdrawal of an infant witness under ten years of age where it appears that such minor is incapable of receiving an impression as to an event and truthfully relating it;[8] an order consolidating actions;[9] a ruling upon an objection to a statement on new trial that it was not presented in time;[10] an order directing a receiver to pay a fund in his hands into court;[11] an order of reference without the consent of the parties in a case where such consent is required;[12] and an order after judgment;[13] unless such order is directly appealable.[14]

§ 97. Pleadings, Evidence and Nonsuit.—Though the code provides that an order sustaining or overruling a demurrer is deemed to have been excepted to, such ruling is usually entered of record, and in accordance with the rule already stated, no exception is necessary even in the absence of statute.[15] No exception need be taken either to an order allowing an amendment to a pleading,[16] or refusing to allow such an amendment.[17] But an order refusing to allow the plaintiff to file a supplemental complaint is not an order refusing to allow an amendment to the pleading within the meaning of the code, and must

7. Grand Grove of U. A. O. of Druids v. Garibaldi Grove etc. Druids, 105 Cal. 219, 38 Pac. 947.

8. Exposito v. United Railroads (Cal. App.), 183 Pac. 576.

9. Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963.

10. Perry v. J. Noonan Loan Co., 1 Cal. App. 609, 82 Pac. 623.

11. Coburn v. Ames, 80 Cal. 243, 22 Pac. 174.

12. Shain v. Peterson, 99 Cal. 487, 33 Pac. 1085; Joshua Hendy Machine Wks. v. Pacific Cable Const. Co., 99 Cal. 421, 33 Pac. 1084. See supra, § 95, as to when exception to the ruling of a referee is to be taken.

13. Brown v. Delavan, 63 Cal. 303.

14. See infra, § 99, for appealable orders.

15. See supra, § 96.

16. Code Civ. Proc., § 647.

17. Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

Formerly, the rule was otherwise. Durrell v. Dooner, 119 Cal. 411, 51 Pac. 628; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132; Witherby v. Thomas, 55 Cal. 9.

be excepted to.[18] While an order striking out a pleading or a portion thereof is enumerated as an order deemed excepted to,[19] no mention is made of an order refusing to strike out a pleading. Such order must therefore be excepted to,[20] except when made in the absence of the complaining party, when it would be embraced within the provision relating to ex parte orders.[1]

As to evidence.—Though the rule was otherwise both under the Practice Act and under the code prior to the year 1909, it is now provided that an order is deemed excepted to which grants or denies a motion to strike out evidence or testimony,[2] which sustains an objection to evidence,[3] or which overrules such an objection.[4]

18. Giddings v. Seventy-six Land & Water Co., 109 Cal. 116, 41 Pac. 788.

19. Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696; Davis v. Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270 (order striking out demurrer); Ross v. Flynn (Cal. App.), 189 Pac. 293. But see Calderwood v. Brooks, 28 Cal. 151 (decided under the Practice Act).

20. Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; Davies v. Ramsdell, 40 Cal. App. 424, 181 Pac. 94.

1. Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92. See infra, § 99, as to ex parte orders.

2. Code Civ. Proc., § 647.

3. Prior to 1909, an exception was necessary; Randall v. Freed, 154 Cal. 299, 97 Pac. 669; United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243 (holding in an election contest, each particular ballot is regarded as a piece of evidence, and the ruling of the court on an objection must be excepted to); Dickerson v. Dickerson, 108 Cal. 351, 41 Pac. 475; Lay v. Parsons, 104 Cal. 661, 38 Pac. 447 (holding rule as to necessity of reserving exceptions to be applicable to election contests); McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Austin v. Andrews, 71 Cal. 98, 16 Pac. 546; Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183; Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94 (exception to ruling on offer of evidence); Marsters v. Lash, 61 Cal. 622; McCartney v. Fitz Henry, 16 Cal. 184; Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470; Crackel v. Crackel, 17 Cal. App. 600, 121 Pac. 295.

4. Formerly the rule was otherwise. Houghton v. Kern Valley Bank, 157 Cal. 289, 107 Pac. 113; Lay v. Parsons, 104 Cal. 661, 38 Pac. 447 (holding rule applicable to election contests); Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835; City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Austin v. Andrews, 71 Cal. 98, 16

As to nonsuit.—Formerly, the improper granting of a nonsuit was reviewable only where an exception was entered at the time of the ruling and specified in the motion as a ground for a new trial, or upon appeal from a judgment based upon a bill of exceptions showing that such exception was taken at the time the order was made.[5] But now under the code, orders deemed excepted to include orders granting,[6] and orders denying a nonsuit.[7] The code does not, however, give an exception to a refusal to pass upon a motion to dismiss.[8]

§ 98. **Instructions, Verdict and Decision.**—Since the amendment of 1909 to section 647 of the Code of Civil Procedure, exceptions are deemed to have been taken to

Pac. 546; Thiele v. Koster, 63 Cal. 241; Marsters v. Lash, 61 Cal. 622; Russell v. Dennison, 45 Cal. 337; Keeran v. Griffith, 34 Cal. 580; Turner v. Tuolumne County Water Co., 25 Cal. 397; Pearson v. Snodgrass, 5 Cal. 478; Van Leuven v. Van Leuven, 3 Cal. App. 409, 85 Pac. 860; McVey v. Beam, 4 Cal. Unrep. 908, 38 Pac. 515; Briggs v. Wangenheim, 1 Cal. Unrep. 518; Baird v. Duane, 1 Cal. Unrep. 492; Kellogg v. Crippen, 1 Cal. Unrep. 161. See Woods v. Jensen, 130 Cal. 200, 62 Pac. 473 (holding that an improper question asked by court or counsel must be excepted to).

5. Prior to 1909, an exception to an order granting a nonsuit was necessary; Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701; Estate of Kasson, 141 Cal. 33, 74 Pac. 436; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Kennedy & Shaw Lumber Co. v. Dusenbery, 116 Cal. 124, 47 Pac. 1008 (where no exception is taken, it must be assumed that the nonsuit was properly granted); Craig v. Hesperia Land & Water Co., 107 Cal. 675, 40 Pac. 1057; Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Cravens v. Dewey, 13 Cal. 40; Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787; Nelmes v. Wilson, 4 Cal. Unrep. 267, 34 Pac. 341; Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452.

6. Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787; Ringgold v. Haven, 1 Cal. 108. Under the act of February 28, 1850, no exceptions to the ruling of the court were necessary.

7. Beeson v. Schloss (Cal.), 192 Pac. 292; Carter v. Canty, 181 Cal. 749, 186 Pac. 346. See Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132, under former practice.

8. Lampton v. Davis Standard Bread Co. (Cal. App.), 191 Pac. 710.

the giving of an instruction, although no objection to such instruction was made;[9] and also to a refusal to give an instruction,[10] and to a modification of an instruction requested.[11]

Verdict and decision.—No exception need be taken to the verdict of the jury,[12] or the final decision in an action or proceeding.[13] Even under the Practice Act, though it

9. See supra, § 96. Formerly, the rule was otherwise. Randall v. Freed, 154 Cal. 299, 97 Pac. 669; Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692; Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; Williams v. Southern Pacific R. Co., 110 Cal. 457, 42 Pac. 974; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033; Lynn v. Southern Pacific Co., 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018; Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625; Allingham v. Rix (Cal.), 28 Pac. 579; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545; Malone v. Crescent City Mill & T. Co., 77 Cal. 38, 18 Pac. 858; Ryall v. Central Pacific R. R. Co., 76 Cal. 474, 18 Pac. 430; Sierra Union Water & Mining Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Clark v. His Creditors, 57 Cal. 639; Mallett v. Swain, 56 Cal. 171; Chester v. Bower, 55 Cal. 46; Coleman v. Gilmore, 49 Cal. 340; Russell v. Dennison, 45 Cal. 337; Lightner v. Menzel, 35 Cal. 452; Wilkinson v. Parrott, 32 Cal. 102; St. John v. Kidd, 26 Cal. 263 (as to time of taking exception); Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Collier v. Corbett, 15 Cal. 183; Holverstot v. Bugby, 13 Cal. 43; Letter v. Putney, 7 Cal. 423; Finnall v. Merriman, 13 Cal. App. 609, 110 Pac. 462; Fleischhauer v. Fabens, 8 Cal. App. 30, 96 Pac. 17; Taggart v. Bosch, 5 Cal. Unrep. 690, 48 Pac. 1092; Los Angeles County v. Reyes, 3 Cal. Unrep. 775, 32 Pac. 233; Couldthirst v. Kelley, 1 Cal. Unrep. 796; Baird v. Duane, 1 Cal. Unrep. 492; Myers v. Liening, 1 Cal. Unrep. 78; Native American Min. Co. v. Lockwood, 1 Cal. Unrep. 5.

In the federal court the giving of instructions will not be reviewed if not excepted to. Southern Pacific Co. v. Stephany, 255 Fed. 679.

10. Prior to 1909 an exception was necessary. Leahy v. Southern Pacific R. Co., 65 Cal. 150, 3 Pac. 622; Emerson v. County of Santa Clara, 40 Cal. 543; Collier v. Corbett, 15 Cal. 183; Taggart v. Bosch, 5 Cal. Unrep. 690, 48 Pac. 1092; Native American Min. Co. v. Lockwood, 1 Cal. Unrep. 5.

11. Formerly the rule was otherwise. Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33; Lightner v. Menzel, 35 Cal. 452.

12. Thompson v. Hancock, 51 Cal 110. See Matter of Will of Bowen, 34 Cal. 682 under Practice Act.

13. Thompson v. Hancock, 51 Cal. 110; Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452. See Headley v. Reed, 2 Cal. 322 (holding that a

was not specifically provided that a final decision was deemed excepted to, the practice was uniform that an exception was not required.[14]

Under the code provision that "the verdict of the jury or the final decision of the court or referee" were deemed excepted to, it has been held that the word "decision" in this connection, placed as it is in apposition to the word "verdict," is manifestly intended to apply to the findings of fact.[15] The phrase "final decision in an action or proceeding" in the present code probably has a somewhat broader significance than this, however. Since the code requires no exception to the final judgment,[16] and as a nonsuit is not authorized except upon a motion of a party, it follows that a summary judgment of dismissal at the

report of a referee not made immediately after the close of the testimony was deemed excepted to under the Practice Act).

14. Matter of Will of Bowen, 34 Cal. 682.

The act of 1866 (Stats. 1865–66, p. 843), provided that no judgment shall be reversed on appeal for want of a finding in writing at the instance of a party who, at the time of the submission of the cause, shall not have requested a finding in writing and had such request entered in the minutes of the court. It also required exceptions to defects in findings when the cause was tried by the court, by a commissioner or referee: Carroll v. City of Benicia, 40 Cal. 386; Cowing v. Rogers, 34 Cal. 648 (as to office of exceptions); Merrill v. Chapman, 34 Cal. 251.

The act of 1861 provided that no judgment shall be reversed for want of a finding or for a defective finding of facts, unless exceptions be made in the court below to the finding or want of finding. (Stats. 1861, p. 589.) And see the following decisions under this act: Poppe v. Athearn, 42 Cal. 606 (opinion delivered before rehearing); Steinback v. Krone, 36 Cal. 303 (no exception to implied findings is necessary); Gay v. Moss, 34 Cal. 125; Tewksbury v. Magraff, 33 Cal. 237 ("the statute is undoubtedly productive of more mischief than good"); Green v. Clark, 31 Cal. 591; Troy v. Clarke, 30 Cal. 419; Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124; Lucas v. City of San Francisco, 28 Cal. 591; Hidden v. Jordan, 28 Cal. 301; Bryan v. Maume, 28 Cal. 238; Calderwood v. Brooks, 28 Cal. 151; Hurlburt v. Jones, 25 Cal. 225; Cook v. De La Guerra, 24 Cal. 237; Warner v. Holman, 24 Cal. 228; Marshall v. Ferguson, 23 Cal. 65. See McKeon v. McDermott, 22 Cal. 667, 83 Am. Dec. 86, in which the judgment under review was rendered prior to the passage of the act.

15. Thompson v. Hancock, 51 Cal. 110.

16. See supra, this section.

close of the trial, without any motion therefor, is a final judgment deemed excepted to, although it is termed a dismissal.[17]

§ 99. **Ex Parte and Appealable Orders.**—An order made upon ex parte application is one of the orders enumerated in the code as orders deemed to have been excepted to.[18] An order is defined by the code as: "Every direction of a court or judge, made or entered in writing, and not included in a judgment."[19] In an early case an order was defined to be "a decision made during the progress of a cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, or necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment."[20] These definitions have been approved as showing the proper scope of the term "order" as used in the code section under discussion. A ruling of a court made during the progress of a trial, either admitting or excluding evidence, is not, therefore, an order within the meaning of this code section, and is not deemed to have been excepted to by virtue of this provision.[1] As the code provides that an order or decision from which an appeal may be taken is deemed excepted to, it follows that no exception need be taken to an order on a motion for a different judgment on the findings.[2]

17. Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452.

18. Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Lincoln v. Sibeck, 27 Cal. App. 61, 148 Pac. 967; Lamet v. Miller, 2 Cal. Unrep. 679, 11 Pac. 744 (holding that the fact that the motion was taken under advisement will not create a presumption as to the party's absence).

19. Code Civ. Proc., § 1003 (in part). See MOTIONS.

20. Loring v. Illsley, 1 Cal. 24.

1. McGuire v. Drew, 83 Cal. 225, 23 Pac. 312.

2. Rahmel v. Lehndorff, 142 Cal. 681, 100 Am. St. Rep. 154, 65 L. R. A. 88, 76 Pac. 659.

Order refusing to set aside a default.—By virtue of the provision that an interlocutory order or decision finally determining the rights of the parties or some of them is deemed to have been excepted to, no exception to an order refusing to set aside a default is necessary.[3]

§ 100. Form and Requisites of Exception.—The code provides that no particular form of exception is required;[4] but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient.[5]

It is sufficient if the exception points out clearly the error complained of.[6] As the exception is taken at the time of the ruling challenged, and as the grounds of objection have already been stated in the objection, it is sufficient for the party merely to say, following an adverse ruling, that he excepts.

With reference to the sufficiency of exceptions to instructions, formerly necessary, there was a clear distinction made between written instructions requested by the parties and oral instructions given by the court of its own motion. Exceptions to the written instructions might be general;[7] but in the absence of a stipulation by counsel

3. Roberts v. Wilson, 3 Cal. App. 32, 84 Pac. 216 (distinguishing Grazidal v. Bastanchure, 47 Cal. 167).

4. Code Civ. Proc., § 648; McCreery v. Everding, 44 Cal. 246. See Cohn v. Mulford, 15 Cal. 50 (under Practice Act, § 189, requiring the point of the exception to be particularly stated).

5. See infra, § 412.

6. McCreery v. Everding, 44 Cal. 246.

7. Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Cavallaro v. Texas & P. Ry. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497; Robinson v. Western Pacific R. R. Co., 48 Cal. 409; Shea v. Potrero & Bay View R. R. Co., 44 Cal. 414 ("whether the distinction is well founded or not, it is sufficient to say that such is the long-established practice of this court"); McCreery v. Everding, 44 Cal. 246. Compare Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557 (holding that there must be an exception to each of the instructions by number or other designation).

waiving all but a general exception,[8] exceptions to oral instructions were required to point out the specific portions of the charge objected to, so that the judge might, before the jury retired, correct any error he had inadvertently fallen into.[9] The rule was equally applicable where it was claimed that all the propositions laid down in the charge were objectionable.[10]

IV. MOTION FOR NEW TRIAL.

§ 101. In Civil Actions or Proceedings Generally.—An appeal may be taken from a judgment without moving for a new trial in the trial court.[11] But as regards certain points, it is generally regarded as the duty of counsel to give the trial court an opportunity to correct whatever error it may have made in respect thereto on motion for new trial, and where this is not done, the appellate court will not review the rulings of the trial court upon the point.[12] Thus, a party complaining of a refusal to grant a continuance should move for a new trial and support

8. Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929.

9. Wales v. Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932, 1120 (holding exception sufficient); Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Cavallaro v. Texas & P. Ry. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497; Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318; Rogers v. Mahoney, 62 Cal. 611 (exception to part of a charge about probable cause); Rider v. Edgar, 54 Cal. 127; Brown v. Kentfield, 50 Cal. 129; Robinson v. Western Pacific R. R. Co., 48 Cal. 409; Sill v. Reese, 47 Cal. 294; Shea v. Potrero & Bay View R. R. Co., 44 Cal. 414; Bowman v. Cudworth, 31 Cal. 148 (a stipulation in the transcript that "the plaintiff duly excepted" imports that a sufficient exception was taken); Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Payne v. Treadwell, 16 Cal. 220 (on rehearing); Love v. Anchor Raisin Vineyard Co., 5 Cal. Unrep. 425, 45 Pac. 1044; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90; Page v. Lynch, 2 Cal. Unrep. 121; Metropolitan Redwood Lumber Co. v. Davis, 205 Fed. 486.

10. Rider v. Edgar, 54 Cal. 127.

11. Innis v. Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305 (Hastings, C. J., dissenting). See supra, § 8.

12. See 2 Ruling Case Law, 98.

his application with the affidavits of absent witnesses or show that they cannot be obtained. If this be not done, the action of the trial court will not be reviewed on appeal.[13] If the trial court changes its rulings to the prejudice of a party, the objection cannot be reviewed on appeal, unless the party first presents the matter to the trial court upon a motion for a new trial either on the ground of irregularity of the court or accident or surprise.[14] Objections to the form of the verdict are available only on motion for new trial, and cannot be raised for the first time on appeal.[15] And this is true of the objection that the verdict awards excessive damages,[16] or that it was rendered under the influence of passion or prejudice.[17]

Rule in probate proceedings.—In probate proceedings, however, the merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself which is sought to be reviewed.[18] As remarked by Mr. Justice McFarland, in a recent case:

"The disposition of many attorneys to inject the procedure of a motion for a new trial into probate litigation uselessly raises difficult questions. The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself which is sought to be reviewed."[19]

The amendment to section 1714 of the Code of Civil Procedure abolishing motions for new trial in probate

13. Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161.

14. Smith v. Sinbad Development Co., 11 Cal. App. 253, 104 Pac. 706.

15. Campbell v. Jones, 41 Cal. 515.

16. Campbell v. Jones, 41 Cal. 515; Clarke v. Fitch, 41 Cal. 472; Williams v. A. R. G. Bus Co. (Cal. App.), 190 Pac. 1036; Chiarini v. Rochon, 1 Cal. Unrep. 540.

17. Williams v. A. R. G. Bus Co. (Cal. App.), 190 Pac. 1036.

18. Estate of Vanderhurst, 171 Cal. 553, 154 Pac. 5; Estate of Geary, 146 Cal. 105, 79 Pac. 855; Estate of Franklin, 133 Cal. 584, 65 Pac. 1081 (holding that the proceeding of a motion for new trial does not apply to the case of an order settling the annual account of an executor).

19. Estate of Geary, 146 Cal. 105, 79 Pac. 855.

proceedings, except in will contests, conformed to this declaration of the court.[20]

§ 102. Sufficiency of Evidence—*Rule under the practice act.*—Under the Practice Act, the appellate court could not review evidence on an appeal from a judgment. In order to obtain such a review it was necessary, (1) that the party move for a new trial on this ground;[1] (2) that he specify in his statement the particulars in which the evidence is insufficient to justify the verdict or decision;[2] (3) that the motion be ruled on;[3] and (4) that an appeal be taken from the order denying a new trial.[4] The same rule applied in equity cases, especially after the passage of the act of 1861.[5]

20. Estate of Vanderhurst, 171 Cal. 553, 154 Pac. 5. See EXECUTORS AND ADMINISTRATORS; NEW TRIAL.

1. Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393; Yates v. Smith, 40 Cal. 662; Reed v. Bernal, 40 Cal. 628 (overruling Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770, and holding that the same rule applied in cases tried by the court without a jury, in which no findings were made, for in such case, the law implied findings sufficient to sustain the judgment); Cowing v. Rogers, 34 Cal. 648 (the point cannot be raised by exception to the findings); Rice v. Inskeep, 34 Cal. 224; Gay v. Moss, 34 Cal. 125 (a respondent who did not except to the findings or move for a new trial cannot question the findings on appeal); Keeran v. Allen, 33 Cal. 542; Green v. Clark, 31 Cal. 591; People v. Banvard, 27 Cal. 470; Gagliardo v. Hoberlin, 18 Cal. 394; Nieto's Heirs v. Carpenter, 21 Cal. 455; Deputy v. Stapleford, 19 Cal. 302; Liening v. Gould, 13 Cal. 598; Rhine v. Bogardus, 13 Cal. 73; Garwood v. Simpson, 8 Cal. 101 (on petition for rehearing); Brown v. Tolles, 7 Cal. 398; Ingraham v. Gildermester, 2 Cal. 483; Smith v. Phelps, 2 Cal. 120; Brown v. Graves, 2 Cal. 118; Griswold v. Sharpe, 2 Cal. 17; Himmelmann v. Sherman, 1 Cal. Unrep. 803; People v. Parrott, 1 Cal. Unrep. 412; Doll v. McCumber, 1 Cal. Unrep. 135.

2. See infra, § 412.

3. Myers v. Casey, 14 Cal. 542.

4. Marziou v. Pioche, 8 Cal. 522; Ingraham v. Gildermester, 2 Cal. 483; Doll v. McCumber, 1 Cal. Unrep. 135.

5. Stats. 1861, p. 843 (this act provides that no distinction as to the mode of taking or perfecting appeals, or as to the effect of them, shall be made between cases at law and cases in equity); Harris v. San Francisco Sugar Refining Co., 41 Cal. 393; Allen v. Fennon, 27 Cal. 68; Green v. Butler, 26 Cal. 595; Deputy v. Stapleford, 19 Cal. 302; Gagliardo v. Hoberlin, 18 Cal. 394

Rule under the code.—In a recent decision of the supreme court in Bank, Mr. Justice Shaw (all other justices concurring) has given clear and definite expression to the code rule as to review on appeal of the sufficiency of the evidence to justify the decision or verdict.

"Section 939 [of the Code of Civil Procedure] as enacted in 1872, and as it remained until 1915, contained this clause: 'But an exception to the decision, or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the entry of the judgment.' . . . [6] In the amendment of 1915 this clause was omitted from the section. The plaintiffs' claim is that this omission eliminates the only authority for a consideration of the sufficiency of the evidence to support the findings where there was no motion for a new trial. There is no merit in the objection. Section 956, as amended in 1915, retains the provision previously contained therein that 'upon an appeal from a judgment the court may review the verdict or decision.' This clearly gives this court authority to consider the sufficiency of the evidence to support the verdict or findings in every case where the evidence is properly included in the record on appeal, either by a bill of exceptions or by a record prepared as prescribed in section 953a, and without regard to the question of there having been a motion for a new trial.[7] The code originally allowed an appeal from the judgment to be taken within one year after the entry thereof. Section 956, if not qualified by other sections,

(overruling Dewey v. Bowman, 8 Cal. 145); Duff v. Fisher, 15 Cal. 375.

6. And see the following authorities: Steen v. Hendy, 4 Cal. Unrep. 916, 38 Pac. 718 (holding the sufficiency of the evidence to justify the decision will not be considered where no motion for a new trial was made and the appeal from the judgment was not taken within sixty days); Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811. See, also, Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 Pac. 24, where the court said that the sufficiency of the evidence would not be reviewed, as the plaintiff had failed to move for a new trial. It appears from the transcript on appeal, however, that the appeal from the judgment was not taken within sixty days.

7. For expressions contra, see Thompson v. White, 76 Cal. 381, 18 Pac. 399, and Petersen v. Taylor, 4 Cal. Unrep. 335, 34 Pac. 724.

would then have allowed the sufficiency of the evidence to be considered on an appeal taken at any time within the year. The above-quoted clause of section 939 did not give the right to such review, but merely put a limitation thereon, forbidding its exercise, except when the appeal was taken within sixty days. The right was given by section 956, which, in this respect, was not changed by the amendment. When the time of taking an appeal from the judgment was reduced to sixty days, by the amendment of 1915 to section 939, there remained no reason for the previous limitation and it was very properly omitted."[8]

Under the code, therefore, the sufficiency of the evidence to support the findings may be reviewed as effectually on appeal from the judgment as upon appeal from an order refusing a new trial. And this is so whether the appeal is taken by the regular or alternative method.[9]

§ 103. **Errors of Law.**—While under the Practice Act an appellate court would not review the facts of a case unless a new trial was demanded in the court below, it was established that a motion for new trial was not necessary in order to have reviewed errors of law occurring in the trial court.[10] As was said in an early case:

"To hold that a new trial must be asked for in all cases before the error could be reviewed, would be in violation of all settled rules on this subject. At common law, a motion for new trial released the errors, and a writ of error would not lie after the motion had been

8. Smith v. Lightston (Cal.), 186 Pac. 769 (in Bank—per Shaw, J.). See California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113 (where the right is based upon Code Civ. Proc., § 939). See, also, Perkins v. Cooper, 3 Cal. Unrep. 279, 24 Pac. 377 (opinion in Bank, 87 Cal. 241, 25 Pac. 411), where the court in department said the implication from section 939 was that the sufficiency of the evidence might be reviewed without a motion for new trial, if the appeal was taken in sixty days.

9. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981.

10. Walls v. Preston, 25 Cal. 59; Rice v. Gashirie, 13 Cal. 53; Brown v. Tolles, 7 Cal. 398; Soule v. Dawes, 6 Cal. 473.

made. There is no provision in our Practice Act of which we are aware that has changed the rules so as to make a motion necessary. As a matter of public convenience, it ought not to be established, for it would delay appeals from one to three months, while the motion was pending, and . . . compel the judge below to commit the same error twice, before an appeal would lie."[11]

The same is true under the code. Though permitted, it was never required that a party complaining of errors of law should move for a new trial in the court below before taking an appeal.[12] Accordingly, a motion for a new trial is not a prerequisite to the review on appeal of the following: An error in denying a trial by jury;[13] errors in the admission of evidence;[14] an error in granting a nonsuit;[15] or errors in giving or refusing instructions.[16] Nor is a motion for a new trial necessary to the review of an objection to a judgment which appears on the face of the findings,[17] as, for example, where the court did not draw the proper conclusion from the facts found.[18]

The absence of the trial judge from the courtroom during a portion of the trial, however, is not an "error,"

11. Brown v. Tolles, 7 Cal. 398.

12. Massachusetts Bonding & Ins. Co. v. Los Angeles R. R. Corp. (Cal.), 190 Pac. 161. ("It cannot be said that the right to complain of an error appearing on the record is lost by failing to call specific attention to it in presenting a motion for new trial"); Caldwell v. Parks, 47 Cal. 640 ("We do not think that such an inconvenient practice has been promulgated by the Code of Civil Procedure"). But see Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77 (holding that as an order striking out a pleading was not specified on a motion for new trial, it could not be reviewed on appeal from the judgment. No objection which might have been ground for new trial can be considered).

13. In re Robinson's Estate, 106 Cal. 493, 39 Pac. 862.

14. Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858 (though a motion for new trial be made, such errors are reviewable, though the trial court was justified in denying the motion because of the insufficiency of the notice of intention to point out the errors relied on).

15. Sullivan v. Cary, 17 Cal. 80; Darst v. Rush, 14 Cal. 81; Cravens v. Dewey, 13 Cal. 40.

16. Sullivan v. Cary, 17 Cal. 80.

17. California Nat. Bank v. Ginty, 108 Cal. 148, 41 Pac. 38.

18. People v. Hill, 16 Cal. 113.

but an irregularity, and is not reviewable on appeal unless urged as a ground for new trial.[19]

An objection that the judgment is not authorized by the pleadings, as where the judgment is rendered upon a cause of action not sued upon, is apparent of record, and may be reviewed without as well as with a motion for new trial, provided there is an appeal from the final judgment. This objection is sometimes included among the grounds of the motion, but without any necessity, and its omission in stating the grounds of the motion raises no presumption that it is waived.[20]

F. PROCEDURE TO PERFECT APPEAL AND TIME THEREFOR.

I. General Principles.

§ 104. Introductory. — The constitution does not attempt to prescribe or regulate the procedure in taking and perfecting appeals, and the legislature has plenary powers over this subject.[1] There can be no question of the power of the legislature to prescribe any reasonable condition to the exercise of the right of appeal.[2]

The manner and the time of taking appeals in civil actions generally is governed by sections 939, 940, 941, 941a, 941b and 941c of the Code of Civil Procedure. By section 1714 the provisions of these sections are made applicable to appeals in probate proceedings, except in so far as they are inconsistent with the provisions of the code dealing specifically with probate matters. When the chapter relating to appeals in general was amended or enlarged in 1907, by new sections furnishing an alternative method of appeal, the amendments and new sections

19. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

20. Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Putnam v. Lamphier, 36 Cal. 151.

1. Estate of McPhee, 154 Cal. 385, 97 Pac. 878; Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

2. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

by the terms of section 1714 are carried over and imported into probate proceedings, but like the provisions which they supplement, only in so far as they are consistent with the rules laid down in the title governing probate proceedings.[3]

§ 105. Methods of Taking Appeal in General.—There are two methods for taking appeals, either of which may be pursued and confers jurisdiction on the appellate court if there is a requisite compliance with the provisions of the code.[4] One method, called the old or regular method, is prescribed by sections 940 and 941 of the Code of Civil Procedure; the other, called the new or alternative method, is prescribed by section 941a, 941b and 941c of that code.[5] The new or alternative method was adopted in 1907 because of the extreme technicality which prevailed under the old method and of the frequent dismissals of appeals resulting therefrom.[6] While the legislature has by the new method accomplished a radical change and wholesome reform in method by which appeals might be taken, it did not abolish the old method, for the prudential reason, among others, that some question as to the constitutionality of the act might arise.[7] The constitutionality of the provisions relating to the new method has since been determined.[8] There is nothing in the code which requires an appellant to make an election as to the method which he shall adopt in taking his appeal, or which concludes him from insisting

3. Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Estate of McPhee, 154 Cal. 385, 97 Pac. 878.

4. Estate of McPhee, 154 Cal. 385, 97 Pac. 878; Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023 (by supreme court on denying petition for rehearing).

5. Colburn v. Parrett, 25 Cal. App. 749, 145 Pac. 540.

6. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

7. Mitchell v. California & O. S. S. Co., 154 Cal. 731, 99 Pac. 202.

8. Estate of McPhee, 154 Cal. 385, 97 Pac. 878 (the act is not unconstitutional because service of notice is not required, as the due process clause has no application to notices of appeal).

that he has perfected an appeal under the new method, even if he has unsuccessfully attempted to make a good service of notice or filed an insufficient cost bond according to the requirements of the old. If upon examining the transcript it is found that it shows a notice of appeal properly filed which is sufficient ipso facto under the new and alternative method to perfect the appeal, the court will look no further, but will treat a failure to serve the notice or give a cost bond, or an error in attempting to do so, which might have been fatal under the old method, as a matter of no legal consequence.[9]

The code authorizes the taking of an appeal by the alternative method "from any judgment, order or decree of the superior courts of the state."[10] An appeal may be taken by this method from orders as well as from judgments,[11] and as has already been stated, from orders and judgments in probate proceedings, as well as from judgments in civil actions generally.[12]

§ 106. Compliance With Statute—Waiver and Estoppel.—Section 936 of the Code of Civil Procedure provides that a judgment or order in a civil action, except when

9. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747 (defective undertaking); Mitchell v. California & O. S. S. Co., 154 Cal. 731, 99 Pac. 202 (replying to the contention that the doctrine of election of remedies is applicable, and precludes a party who attempted to take an appeal by the old method from urging its sufficiency under the new, the court says: "It is sufficient to say that there is no question here of two or more remedies provided for a review. There is but one remedy—an appeal—for which the legislature has provided two methods under which it may be asserted. The methods are not mutually exclusive, and the old method includes the only thing which is essential in the new toward perfecting an appeal—namely, the filing of the notice"); Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Colusa Milling Co. v. Draper Dray & Storage Co., 13 Cal. App. 329, 109 Pac. 504 (where insufficient undertaking was given); Russell v. Banks, 11 Cal. App. 450, 105 Pac. 261; Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 103 Pac. 946.

10. Code Civ. Proc., § 941a.

11. Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 103 Pac. 946.

12. See supra, § 104.

expressly made final, may be reviewed "as prescribed therein and not otherwise." The provisions of the code regulating the mode of taking appeals must be strictly complied with.[13] And, as the statute is the sole source from which the right of appeal flows, every step which is thereby required to be taken in order to perfect an appeal is jurisdictional, without the observance of which there can be no valid appeal effected.[14] So, also, in probate matters, the right of appeal and the mode of its exercise are purely statutory, and unless a strict compliance with the provisions of the law appears, an attempted appeal will be ineffectual.[15] While it is true that an appellant must follow closely the provisions of the statute in order to have his appeal perfected, it is equally true that he is not required to do more than the statute demands.[16]

Waiver and estoppel.—In accordance with the general rule that jurisdiction cannot be conferred by consent or voluntary submission of the parties, jurisdictional requirements as to the proceedings to perfect an appeal cannot be waived.[17] Though, as will be shown later, service of notice of appeal may be waived by a voluntary appearance.[18] A waiver of the filing of notice by stipulation of the parties is not the equivalent of the filing.[19] It has been held, however, that one may be estopped from

13. Somers v. Somers, 81 Cal. 608, 22 Pac. 967; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Hastings v. Halleck, 10 Cal. 31; Broaddus v. James, 13 Cal. App. 478, 110 Pac. 164; Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402, 35 Pac. 310.

14. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297.

15. Estate of Turner, 139 Cal. 85, 72 Pac. 718.

16. Broaddus v. James, 13 Cal. App. 478, 110 Pac. 164.

17. Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241 (though, says the court by way of dictum: "We think it may very properly be questioned whether an express stipulation of the parties, waiving the steps necessary to perfect an appeal, or that such steps have been taken, made in good faith, should not be binding upon them and confer jurisdiction").

18. See infra, § 117.

19. Bonds v. Hickman, 29 Cal. 460.

urging a noncompliance with the statute even as to jurisdictional requirements. Thus, where the attorney for the respondent in the court below acknowledged service of the notice of appeal without disclosing the fact of the death of the respondent, and concealed the fact of death until after the expiration of the time to appeal, and where such attorney continued to act for the personal representative after his appointment, it was held that he was estopped from objecting to the service. The court said in substance that parties who have fraudulently prevented the service of notice by concealment of material facts and by a failure to enter their objection to the jurisdiction of the court at the proper time, and for the fraudulent purpose of preventing the proper service of the same have delayed making their objection until too late to remedy the defect, should be estopped to attack the notice given and question the jurisdiction of the court.[20]

II. NOTICE OF APPEAL.

Nature and Form.

§ 107. Notice Under Regular Method in General.— Section 940 of the Code of Civil Procedure relating to appeals by the regular method provides:

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial."

This statute, so far as it relates to the notice of appeal, has been substantially the same ever since the enactment of the Practice Act of 1851, and cases decided under the

20. Moyle v. Landers, 75 Cal. 595, 17 Pac. 698; Id., 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241. See Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921, and Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791, distinguishing the Moyle case.

Practice Act are authority under the code. The notice of appeal is the initiatory step taken in the superior court to effect an appeal to the supreme court or district court of appeal.[1] In some respects and for some purposes, it corresponds to the summons by which the defendant is brought before the superior court,[2] but it is not process in a strict sense, as it need not contain all the elements of a summons,[3] or be served upon the party himself.[4] Rather it is the declaration of an intention to make further proceedings in a pending cause,[5] and has as its object the imparting of information of the intention to appeal and what particular judgment or order is appealed from.[6]

Waiver of notice.—Though there are dicta that "the notice itself, like the issuance of summons, may be waived,"[7] it is doubtful if the notice can be waived. This statement was casually made by the court in holding that there may be a waiver of "service" of notice. There is a vital distinction between a waiver of the "notice" itself and a waiver of "service" thereof. Moreover, it has been specifically held that a waiver of "filing" is not equivalent thereto.[8]

Form.—Like other notices in the cause, the statute requires that a notice of appeal be in writing,[9] but it does not prescribe the form of the notice except by the provision that it shall state the appeal from the judgment or order or some specific part thereof.[10] The notice of appeal should not contain an assignment or specification of

1. Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310.

2. Hibernia Savings & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175.

3. Estate of Nelson, 128 Cal. 242, 60 Pac. 772.

4. See infra, § 127.

5. Estate of Nelson, 128 Cal. 242, 60 Pac. 772.

6. Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510.

7. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Hibernia Sav. & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175.

8. See infra, § 115.

9. Estate of Nelson, 128 Cal. 242, 60 Pac. 772.

10. See infra, § 109.

errors.[11] And on an appeal from a final judgment, it is not necessary to give notice that the court will be asked to review certain orders. Indeed, any such notice will be treated as surplusage.[12] A defendant sued by a wrong name may, if the misnomer is not material, appeal by his true name, stating in the notice that he was sued by a particular name and then giving his true name.[13] And where a judgment is based on a void publication of summons, it is proper practice for the defendant appealing therefrom to make a special appearance in the notice of appeal, "for the purpose of contesting the jurisdiction of the court over the person of the defendant."[14]

Defects.—In accordance with the maxim, "Utile per inutile non vitiatur," surplusage in the notice of appeal does not vitiate the notice,[15] and when a notice of appeal is imperfect in a matter not deemed of vital substance, leave to correct it under permission given by section 473 of the Code of Civil Procedure may be taken.[16] If the defect is one which is amendable as of course, it will be disregarded upon appeal.[17]

§ 108. **Title and Address.**—A notice of appeal under the old method should be properly entitled in the court and cause. But an omission of or a mistake in the title does not invalidate the notice if it intelligently refers to the action or proceeding, as section 1046 of the Code of Civil Procedure provides that a "notice . . . without

11. Burnett v. Pacheco, 27 Cal. 408.

12. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

13. Webster v. Board of Regents, 163 Cal. 705, 126 Pac. 974.

14. Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498.

15. Harrelson v. Miller & Lux (Cal.), 188 Pac. 800; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

16. Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Hopkins v. Sanderson, 29 Cal. App. 666, 159 Pac. 1063.

17. Estate of Nelson, 128 Cal. 242, 60 Pac. 772 (holding a defect in the address in that a notice was addressed to the attorneys for "executor" instead of "executors" was amendable as of course).

the title of the action or proceeding in which it is made, or a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligently refer to such action or proceeding.'"[18] A mistake as to the Christian name of a party does not invalidate a notice which is duly entitled as to the court and the department thereof in which the action was tried and which intelligently refers to the number of the case and to the judgment and order denying a motion for new trial.[19] Even the fact that a notice of appeal is entitled in the wrong county does not defeat an appeal when the order appealed from is otherwise sufficiently identified and the respondent is not misled.[20]

Address.—The code does not require that the notice of appeal be addressed to the adverse parties.[1] And undoubtedly the service of a notice, in which the address is omitted, upon the attorney who appeared for all the parties interested is sufficient to sustain an appeal as to all of them.[2] If, however, the notice should be addressed, care must be taken to address it to all the adverse parties, as service upon parties omitted from the address is ineffectual though the title of the court and cause gives the names of all the parties.[3] It has been contended that the address is immaterial because the statute does not prescribe the form of notice and require an address. But the decisions are the other way. The principle appears to be, that while the address preceding the body of the notice is not essential to its validity, yet, if an address is given, it serves as a limitation of the

18. Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

19. Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780.

20. Estate of Damke, 133 Cal. 433, 65 Pac. 888.

1. See Code Civ. Proc., § 940.

2. Estate of Pendergast, 143 Cal. 135, 76 Pac. 962.

3. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Estate of Pendergast, 143 Cal. 135, 76 Pac. 962; Hibernia Savings & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175. See Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69, distinguishing the old method from the new method of appeal.

notice, and shows the intention of the appellant to give notice only to those parties to whom it is addressed, and its effect is limited accordingly.[4]

Inasmuch as the statute provides that a party can receive the information through service of the notice on his attorney, it would be insisting upon an idle ceremony to require the notice to be addressed to the party as well as to his attorney. It is sufficient, therefore, if the notice be addressed to the attorney only. When the attorney served appears for several executors, the fact that the notice is directed to him as attorney for "executor" will be deemed a mistake of the scrivener which cannot mislead. Such defect is amendable as of course.[5]

§ 109. Description of Judgment or Order.—The notice of appeal is required to point out the particular judgment or order or the specific part thereof from which the appeal is taken.[6] While it is doubtful whether a statute enacted in 1861 and providing that no appeal should be dismissed for insufficiency of the notice of appeal is still in force,[7] and though a rigid rule of construction is given the notice in other respects,[8] a liberal rule of construction is generally given to the description in the notice of the judgment or order appealed from in order to effectuate the rights of the parties to the appeal.[9] It is only neces-

4. Estate of Pendergast, 143 Cal. 135, 76 Pac. 962.

5. Estate of Nelson, 128 Cal. 242, 60 Pac. 772.

6. Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Meley v. Boulon, 104 Cal. 262, 37 Pac. 931; Genella v. Relyea, 32 Cal. 159.

7. Stats. 1861, p. 589. Hayne on Appeal, vol. 2, § 207, states that "It seems to be an open question whether the act of 1861, above quoted, is now in force." See Estate of Pacheco, 29 Cal. 224; Flateau v. Lubeck, 24 Cal. 364, and Buffendeau v. Edmondson, 24 Cal. 94, decided under the statute.

8. It was so stated in Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69, in reference to the address. See supra, § 108.

9. Harrelson v. Miller & Lux (Cal.), 188 Pac. 800; Estate of Stone, 173 Cal. 675, 161 Pac. 258; Meley v. Boulon, 104 Cal. 262, 37 Pac. 931; Hopkins v. Sanderson, 29 Cal. App. 666, 159 Pac. 1063; Sweet v. Richvale Land Co., 29 Cal. App. 111, 154 Pac. 608.

sary that the notice identify the order appealed from with reasonable certainty.[10]

A description of an order as one made and entered on a specified date is a sufficient description where it does not appear that any other order was entered on that day.[11] So, also, a notice which merely states that the party appeals "from said judgment made and entered in said action in favor of the defendants and against the plaintiff" is sufficiently definite when there is but one judgment in the action, though such a notice might be void for uncertainty if the record showed more than one judgment, or if it showed in addition to the judgment an order in the nature of a judgment.[12] A notice reciting that an appeal is taken from an order and judgment denying a motion for new trial and entering judgment against the defendant, though ambiguous, is open to a construction covering the judgment as well as the order denying a new trial, and will be applied thereto. If such notice were restricted to the order denying a new trial, the appellant would have no standing in court as such

10. Harrelson v. Miller & Lux (Cal.), 188 Pac. 800 (holding a notice of appeal from that part of the final judgment which limits the amount to be recovered by the defendant from the plaintiff to $760, indicates with reasonable certainty that part of the judgment which provides that the defendant recover $760); Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340. See Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278, holding a notice reciting an appeal "from an order overruling and denying defendant's motion for a new trial upon the judgment made and entered in the above-entitled action, which said order overruling and denying defendant's motion for a new trial was made and entered by said court herein" on a specified date, sufficiently described the order in view of the last clause defining it as an order denying a motion for new trial.

Code Civ. Proc., § 941b, so provides in the case of notice of appeal under the alternative method.

11. Gruell v. Spooner, 71 Cal. 493, 12 Pac. 511.

12. Jones v. Iverson, 131 Cal. 101, 63 Pac. 135. See Colburn v. Parrett, 25 Cal. App. 749, 145 Pac. 540, holding the following notice of appeal to be sufficient: "Notice is hereby given that T. D. P. ——, through his attorneys, A., B. & C., appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein" [signature].

order is not now appealable.[13] So, also, an appeal from a judgment sustaining a demurrer "and from the whole of said judgment" was held to include a judgment for costs, though the appeal from the order sustaining the demurrer was without effect.[14] On the other hand, a notice of appeal from all orders made and entered in an action, either before or after judgment, is too general,[15] and a recital of this character in a notice specifically enumerating certain orders will be treated as surplusage.[16] A statement that the party appeals from that part of a judgment which fails to give him certain relief is an attempt to appeal from what does not appear in the judgment instead of what does appear and would undoubtedly be insufficient standing alone. If this statement is merely cumulative to another statement of appeal, it will be disregarded as surplusage.[17]

Several appeals.—Separate and distinct appeals may be united in one notice.[18] In such case the matters ap-

13. Off v. Crump, 40 Cal. App. 173, 180 Pac. 360 (the court so held although as stated it seemed "entirely probable that the purpose of the notice was an appeal from the order denying a new trial alone"). See supra, § 34.

14. City of Napa v. Maxwell, 36 Cal. App. 103, 171 Pac. 837.

15. Gates v. Walker, 35 Cal. 289 (where the notice stated an appeal, "from all orders and each and every order made therein previous to the last judgment"); Genella v. Relyea, 32 Cal. 159 (where the notice stated that an appeal was taken "from all orders of the district court made and entered in the said two actions jointly and severally, either before or after judgment"). See Day v. Callow, 39 Cal. 593, holding that an appeal from "all the orders and rulings occurring on the trial and excepted to by the defendant" is not an appeal from an order on new trial; Hughes v. Chung Sun Tung Co., 28 Cal. App. 371, 154 Pac. 299, 301, holding the insertion in the notice of general language that an appeal is taken from every interlocutory and intermediate order in a cause adverse to the appellant does not bring up for review an order, the time to appeal from which has expired; Estate of Pacheco, 29 Cal. 224, decided under a statute forbidding the dismissal of appeals for insufficiency of the notice of appeal, and holding notice of appeal sufficient.

16. Williams v. Dennison, 86 Cal. 430, 25 Pac. 244.

17. Harrelson v. Miller & Lux (Cal.), 188 Pac. 800.

18. Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407 (an appeal from a judgment,

pealed from should be so designated that it can be seen from what the appeal has been taken.[19]

Amendment nunc pro tunc.—When an order is amended nunc pro tunc, there is in legal effect but one order, and a notice of appeal describing the first order is sufficient.[20]

§ 110. Effect of Mistake in Description.—It is settled that a mistake in the notice of appeal as to the date of the order or judgment appealed from does not invalidate the appeal, where there is a description of the order or judgment referred to in other parts of the notice reasonably sufficient to identify it.[1] The object of notice of appeal is to impart information to the opposing party of the intention to appeal, and what specific judgment or order is appealed from. If the notice is sufficiently explicit in these particulars and does not mislead the respondent, it should be held sufficient.[2] Under this rule, the giving of an incorrect date of the entry of the judgment appealed from does not invalidate the appeal where it clearly appears that only one such judgment was ever entered in the case, or where there is enough on the face of the notice to show that the judgment or order mentioned in the record is the same as is referred to in the notice.[3] So, also, a notice referring to the order on

and from an order denying a new trial, may be taken by one notice, although all the parties to the former do not appeal from the latter; and a notice stating who the appellants are and what they respectively appeal from is sufficient); Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187 (explaining People v. Center, 61 Cal. 191). See supra, § 8.

19. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

20. Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102.

1. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294.

2. Harrelson v. Miller & Lux (Cal.), 188 Pac. 800; Meley v. Boulon, 104 Cal. 262, 37 Pac. 931; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510.

3. Estate of Stone, 173 Cal. 675, 161 Pac. 258 (where an appeal is taken after filing of judgment, a notice of appeal describing the judgment as a judgment of the date the verdict was rendered rather than of the date the judgment is filed should be construed as an appeal from the judgment, rather than as one from the verdict); Wilson v. Union Iron Works Drydock Co., 167 Cal. 539, 140 Pac.

motion for new trial as an order denying a rehearing is sufficient, as the word "rehearing" as here used can signify nothing else than a new trial.[4] And if a notice of appeal from a part of a judgment specifies the part appealed from with reasonable certainty, so that the respondent is not misled, such notice will suffice even though the terms used in indicating the part of the judgment appealed from are defective.[5]

§ 111. Signature.—While the code nowhere expressly so requires, the notice of appeal should be signed. If the party appealing has appeared by attorney, the notice should be signed by his attorney of record, or an attorney formally substituted,[6] or it seems by any attorney the appellant may choose to conduct the appeal, whether or not he was attorney of record in the court below or has been formally substituted. Since for certain purposes at least an appeal like a writ of error has been held to be a new proceeding, it would seem that the party to the action has full power to constitute an attorney to prosecute the appeal other than the attorney of record in the cause in the trial court, and that a notice of ap-

250 (mistake in month and day); Swasey v. Adair, 83 Cal. 136, 23 Pac. 284 (mistake in day and year); Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510; Chase v. Evoy, 58 Cal. 348; Flateau v. Lubeck, 24 Cal. 364 (decided under a statute providing that no appeal should be dismissed for insufficiency of the notice of appeal). Patterson v. Patterson (Cal. App.), 190 Pac. 483 (where on return of an advisory verdict the clerk made an entry of a purported judgment, and later the judgment of the court properly signed was formally entered, a mistake in describing the judgment as of the former date does not invalidate the appeal); Mitchel v. Gray, 8 Cal. App. 423, 97 Pac. 160 (mistake in month and year).

4. Kimple v. Conway, 69 Cal. 71, 10 Pac. 189.

5. Harrelson v. Miller & Lux (Cal.), 188 Pac. 800.

6. Whittle v. Renner, 55 Cal. 395. See Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310 (an attorney of record in the trial court qualified to act in such court may sign the notice though not qualified to act in the supreme court); Damrell v. Board of Supervisors, 40 Cal. 154 (holding notice of appeal given by attorney of record to be sufficient).

peal signed by an attorney not of record would be sufficient.[7] Opposed to this theory there are several early cases which clearly hold that a notice of appeal signed by an attorney who was not attorney of record for the appellant is insufficient.[8] However this may be, the objection is one which may be waived, and is waived by an acknowledgment of service of notice of appeal,[9] or by joining with the attorney signing the notice in the certificate to the correctness of the transcript.[10] By so doing the respondent waives the objection that notice of substitution was not served upon him, and the objection to the notice of appeal. If the respondent wishes to rely upon the want of notice of substitution, he should return the notice or refuse to acknowledge service of it.[11] So, also, where the notice of appeal is signed by the attorney in fact for the appellant, the acknowledgment of service is a waiver of the defect.[12]

Where there are several attorneys.—Where a party has two or more attorneys of record in the trial court or a firm of attorneys, it has been held that either one of the

7. McDonald v. McConkey, 54 Cal. 143 (the court does not decide this point, but places its decision upon the doctrine of waiver of the right to object. This case was cited in Buell v. Buell, 92 Cal. 393, 28 Pac. 443, as authority for the proposition that a notice of motion to recall a writ of execution may be signed by an attorney who is other than that who appeared in the original action and who has not been substituted as attorney). See ATTORNEYS AT LAW for discussion as to right to change attorneys.

8. Harrigan v. Bolte (Cal.), 8 Pac. 184; Prescott v. Salthouse, 53 Cal. 221. In Whittle v. Renner, 55 Cal. 395, the court called attention to the fact that the code did not require the notice of appeal to be signed by the attorney of record, but said it was not disposed to question the correctness of the judgment in this case. So, also, this case was distinguished in Livermore v. Webb, 56 Cal. 489; Ellis v. Bennett, 2 Cal. Unrep. 302, 3 Pac. 801. See McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732, where this rule is casually mentioned, and it is held that an attorney not of record cannot sign a notice of motion for new trial.

9. Livermore v. Webb, 56 Cal. 489; Withers v. Little, 56 Cal. 370.

10. McDonald v. McConkey, 54 Cal. 143.

11. Livermore v. Webb, 56 Cal. 489.

12. Bashore v. Lamberson, 36 Cal. App. 233, 171 Pac. 968.

two or either of the firm may sign the notice of appeal. While this course may not be technically correct, it has been acquiesced in so long that to hold the contrary would upset numerous appeals that have been taken in good faith.[13]

On appeal by incompetent.—The code requires that an infant or insane or incompetent person who is a party must appear either by his general guardian or by a guardian ad litem appointed by the court.[14] This section applies only where the order of guardianship has been finally established. As no order of a superior court is final when an appeal from it is duly pending, it follows that on an appeal taken by a person from an order adjudging him incompetent and appointing a guardian, the notice of appeal may be signed by the attorney who appeared for the appellant in the guardianship proceeding.[15]

§ 112. Notice Under Alternative Method.—Section 941b of the Code of Civil Procedure, relating to appeals by the alternative method, provides:

"Any person to whom the right of appeal from any judgment, order or decree of the superior courts of the state is granted, may appeal therefrom by filing with the clerk of the court in which the judgment, order or decree is rendered, a notice entitled in the cause in which said judgment, order or decree was made, which said notice shall state that the person giving the same does thereby appeal to the supreme court or district court of appeal, as the case may be, from the judgment, order or decree, or some specific part thereof; and the said notice must

13. Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318. See Prescott v. Salthouse, 53 Cal. 221 (holding that an order "associating" an attorney where there was not substitution of attorneys did not constitute him an attorney of record in the case); and see Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105, holding an appeal will not be dismissed on the ground that the attorney for the appellant is not the attorney of record in the case, but a member of the firm of attorneys who appeared in the court below as attorneys of record.

14. Code Civ. Proc., § 372.

15. Matter of Moss, 120 Cal. 695, 53 Pac. 357.

identify the said judgment, order or decree or the part thereof appealed from, with reasonable certainty."

The terms of this section, referring to the notice of appeal and the service thereof, differ essentially from those of section 940. They indicate that in all other particulars except those specified, form is not to be held important or necessary to the validity of an appeal. The expression of certain things to be stated in the notice implies that others are not regarded as essential. For example, it is unnecessary that the adverse parties be named as such in the notice.[16] It is true that there was no such requirement as to the notice of appeal under the regular method, but from judicial views as to the general rules of law applicable to such notices, it was held that a notice addressed to certain parties by name was ineffectual as to parties not mentioned, though named in the title of the action and actually served with the notice.[17] Section 941b does not require service of the notice, but compels the prevailing parties to look to the files to ascertain whether or not an appeal has been taken. It follows that this limitation upon the effect of the notice is not applicable to notices under the new method, and that the mere mention of some of the adverse parties will not vitiate the appeal as to the others.[18]

The provisions relating to appeals by the alternative method do not free an appeal from the limitation of section 956 of the Code of Civil Procedure, forbidding on an appeal from a judgment a review of any appealable order; and under this method, as under the regular method, it is necessary for the notice to state separately whether the appeal is taken from the judgment or some order, or both.[19]

16. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

17. See supra, § 108.

18. Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

19. Starkey v. Parker (Cal. App.), 186 Pac. 195.

§ 113. Title and Designation of Appellant.—Section 941b of the Code of Civil Procedure requires that the notice of appeal be "entitled in the cause in which said judgment, order or decree was made." Under this provision, where there are several coparties, either plaintiff or defendant, it is sufficient to give the name of one of the parties and to include the others under the designation "et al.," when in the body of the notice it is stated that "the defendants in the above-entitled action desire to appeal and do hereby appeal." Such a notice should be construed as indicating that all the coparties against whom judgment is entered appeal therefrom.[20] So, also, in an action in which the parties are jointly liable, a notice thus entitled is sufficient to indicate an appeal by all the coparties, though it is stated in the body that the parties "above named" appeal. The law requires that a liberal rule of construction be given such notices.[1]

Designation of appellant.—The notice should state that the party giving it thereby appeals. The misnomer of one of several appellants in the notice does not require a dismissal of the appeal as to the others who are correctly named, when the judgment appealed from is otherwise sufficiently identified. And when it is perfectly apparent from the notice, when read in connection with the record, that the misnomer is a mere clerical misprision which could not have misled the adverse party, the notice is not even rendered invalid as to the appellant as to whom the misnomer occurred.[2] A statement following the name of the party in the body of the notice characterizing it as an executor, for example, is a mere description of the person and not a limitation of the character in which he takes the appeal. Notwithstanding such statement, the appeal is to be considered as an appeal by the

20. Hopkins v. Sanderson, 29 Cal. App. 666, 159 Pac. 1063.

1. Hopkins v. Sanderson, 29 Cal. App. 666, 159 Pac. 1063.

2. Chung Sing v. Southern Pacific Co., 178 Cal. 261, 172 Pac. 1103.

party in any capacity in which he is entitled to take such appeal.[3]

§ 114. Statement that Party Appeals.—Under the alternative method the notice must state that the person giving it "does thereby appeal" to the supreme court or district court of appeal, as the case may be.[4] There must be an actual compliance with this requirement in the statutory language or its equivalent, before the notice will be held to constitute a notice of appeal within the terms of the code.[5] This notice has been confused with that prescribed in section 953a of the Code of Civil Procedure, but the two are entirely distinct. The latter is not a notice of appeal. It is merely a step in the proceedings for the preparation of the record or transcript on appeal, and is not jurisdictional to the appeal.[6] It follows that a notice to the clerk in literal compliance with 953a stating that the party "desires to," "intends to," "will," or "has taken" an appeal, and requesting the clerk to prepare a transcript of the proceedings and evidence, cannot be construed as the notice of appeal required to be given by sections 940 or 941b of the code, and standing alone is insufficient as a notice of appeal.[7]

3. Estate of Rawitzer, 175 Cal. 585, 166 Pac. 581.

4. Code Civ. Proc., § 941b.

5. Eddy v. Hunter (Cal. App.), 189 Pac. 291.

6. Eddy v. Hunter (Cal. App.), 189 Pac. 291; Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023 (opinion by the supreme court, on denying a petition for rehearing, correcting a contrary statement in the opinion of the district court of appeal).

7. Michelson v. City of Sacramento, 173 Cal. 108, 159 Pac. 43; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Lent v. California Fruit Growers' Assn., 161 Cal. 719, 121 Pac. 1002 (though the court made no statement of facts, the record shows that the only notice given was a notice for transcript under section 953a, in which it was recited that the defendants "intend to appeal" from the judgment); Salisbury v. Yawger, 30 Cal. App. Dec. 376; Eddy v. Hunter (Cal. App.), 189 Pac. 291 (a notice stating that the party "has appealed" is insufficient as a notice of appeal under section 941b of the Code of Civil Procedure, as is also a notice stating that the party "will appeal"); Oxford v. Imperial Southside Water

Distinguishable from this notice, is a notice which, though in form a notice under section 953a, also states that the party "does thereby appeal" from a judgment or order. Such a notice is good as a notice of appeal under section 941b of the code, notwithstanding the fact that it is so drawn as to serve the double purpose of a notice of appeal and a notice to the clerk under section 953a. The recital that the notice is given "pursuant to section 953a of the Code of Civil Procedure" may properly be deemed applicable solely to the subsequent portion constituting notice to the clerk, or it may be rejected as surplusage.[8]

Request to clerk.—The notice of appeal under the alternative method need not contain a request that the transcript be made up and prepared, as provided in section 953a of the Code of Civil Procedure,[9] and where the notice of appeal conforms to the requirements of section 941b, it cannot be amended to embody such request.[10] But as has just been stated, the fact that the notice contains such request to the clerk does not vitiate it.[11]

Co., 34 Cal. App. 1, 166 Pac. 1023 (where the notice stated that the plaintiff "desires and intends to appeal" and "has appealed" from the judgment); Hughes v. Moncur, 28 Cal. App. 462, 152 Pac. 968; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165 (where the notice stated that the defendant "desired and intended to appeal"). But see Estate of Nutt, 180 Cal. 419, 181 Pac. 661. (The facts are not stated in the opinion, but in Eddy v. Hunter (Cal. App.), 189 Pac. 291, it is stated that an examination of the record shows that the only notice filed stated that the party "desires to appeal," and this notice was held sufficient. The appellate court continuing says: "If that case can be held to constitute a decision that the notice of appeal there before the court was sufficient, its effect was to overrule the previous decisions to which we have referred. However that may be, we feel bound by the decisions which repeatedly have passed upon the question. see infra, § 342.

8. Estate of Faber, 168 Cal. 491, 143 Pac. 737, where the notice stated that the party "desires to appeal and does thereby appeal."

9. Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35. See infra, § 340.

10. Chapuis v. Pesante (Cal. App.), 183 Pac. 247.

11. See supra, this section.

Necessity of Filing and Service.

§ 115. Filing in General.—The filing of the notice of appeal is indispensable in order to enable the appellate court to obtain jurisdiction of the cause, both under the regular[12] and alternative[13] method of taking an appeal, and it cannot be waived.[14] While the notice may be filed at any time after entry of the judgment or order appealed from and before the expiration of the time in which to appeal,[15] it must not be filed before such entry,[16] although where it appears that the notice was filed on the same day as the judgment or order appealed from was entered, an appellate court would not be justified in dividing a day for the purpose of rejecting jurisdiction of the appeal.[17]

Place of filing.—The notice of appeal must be filed "with the clerk of the court in which the judgment or order appealed from is entered."[18] This rule is applicable to an appeal from an order changing the place of trial to another county. Section 399 of the Code of Civil Procedure, providing that "the court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein," relates to the jurisdiction of the court over the trial of the action or other proceeding relating thereto and not to jurisdiction over orders or proceedings had prior to the transfer. Therefore, a notice of appeal filed in the county to which the transfer is made is ineffectual.[19]

When notice is deemed filed.—The rules as to the filing of papers generally are applicable in determining when

12. Beets v. Chart, 79 Cal. 185, 21 Pac. 730; Carey v. Brown, 58 Cal. 180; Bonds v. Hickman, 29 Cal. 460.
13. Code Civ. Proc., § 941b.
14. See supra, § 106.
15. See infra, § 166.
16. See infra, § 167.
17. Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475.
18. Code Civ. Proc., § 940.
19. Mansfield v. O'Keefe, 133 Cal. 362, 65 Pac. 825.

a notice of appeal is filed.[20] A paper is filed when it is delivered at the place where it is to be filed, to the proper officer, and by him received to be kept on file.[1] If the filing can be proved by parol, the proof must show actual delivery of the paper to the clerk or one of his deputies, a delivery to him for the purpose of filing,[2] and a delivery at the place where it is to be filed. Delivering a paper to the proper officer at a place other than the office where it is required to be filed is not sufficient even though the officer indorse it filed.[3] And merely leaving or depositing the notice in the clerk's office after office hours when no one is in the office does not constitute a legal filing on that day.[4] The clerk is justified in refusing to file a notice of appeal until the payment of his fee, and a notice sent him by express is not deemed filed on the day of its receipt when the clerk immediately informs the attorney for the appellant that it would not be filed except upon the payment of the filing fee.[5]

§ 116. Necessity of Service Under Regular Method.—Section 940 of the Code of Civil Procedure, relating to appeals taken by the regular method, specifically requires service of a notice of appeal upon the adverse party or his attorney.[6] This provision is equally as mandatory as that with reference to the filing of notice,[7] and if service is not made within the statutory time, and according

20. See PLEADING; RECORDS. See infra, § 153, as to when undertaking is "filed."

1. W. J. White Co. v. Winton (Cal. App.), 183 Pac. 277.

2. Boyd v. Desmond, 79 Cal. 250, 21 Pac. 755, quoted in W. J. White Co. v. Winton (Cal. App.), 183 Pac. 277.

3. Edwards v. Grand, 121 Cal. 254, 53 Pac. 796, quoted in W. J. White Co. v. Winton (Cal. App.), 183 Pac. 277. See Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223, applying this rule to an undertaking on appeal.

4. W. J. White Co. v. Winton (Cal. App.), 183 Pac. 277.

5. Boyd v. Burrell, 60 Cal. 280.

6. Prior to the code, service of notice of appeal was not required by the Probate Act; Matter of Will of Bowen, 34 Cal. 682. See infra, § 118, as to service under alternative method.

7. Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297.

to the requirements of the statute to effect service, the appellate court acquires no actual jurisdiction of the case,[8] and will dismiss the appeal on its own motion, or on motion of the respondent,[9] unless service is waived,[10] or unless the appeal is sufficient under the code provisions relating to the alternative method, which require no service of the notice of appeal.[11] But when the determination of a motion to dismiss involves an examination of the entire record, and incidentally of the merits of the appeal, the consideration of the motion will be continued until the hearing of the appeal, especially where the motion is not made until after the appellant has filed his points and authorities.[12]

§ 117. Waiver of Service.—It is well established that an appellate court may obtain jurisdiction of an appeal as well by voluntary appearance by an adverse party as by service of notice of appeal upon him. The requirement that notice of appeal be served upon the adverse party is for the protection of such adverse party, and the service of the notice, like service of a summons, may be waived by him or his attorney, and is waived by a voluntary appearance.[13] A mere waiver of service, however, is not effectual unless followed by some act equivalent to

8. Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910; Whipley v. Mills, 9 Cal. 641; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165; Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35.

9. Beets v. Chart, 79 Cal. 185, 21 Pac. 730; Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910; Pateman v. Tyrrel, 59 Cal. 320 (where the record did not show the fact of service); Whipley v. Mills, 9 Cal. 641; Franklin v. Reiner, 8 Cal. 340; Luco v. Commercial Bank, 2 Cal. Unrep. 549, 8 Pac. 274.

10. See infra, § 117.

11. See infra, § 118.

12. Hibernia Savings & Loan Soc. v. Behnke, 118 Cal. 498, 50 Pac. 666.

13. Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Estate of Pendergast, 143 Cal. 135, 76 Pac. 962; McLeran v. Shartzer, 5 Cal. 70; Estate of Mayhew, 4 Cal. App. 162, 87 Pac. 417; Alviso v. United States, 5 Wall. (U. S.) 824, 18 L. Ed. 492, see, also, Rose's U. S. Notes. See APPEARANCE.

an appearance by which the party would be bound by the judgment of the court.[14] As the omission to serve an adverse party goes to the jurisdiction of the appellate court, a failure to raise the objection until petition for rehearing filed does not waive the objection, there being no appearance by the party not served.[15]

When appearance must be made.—The service of notice of appeal has a twofold purpose—first, to give the appellate court jurisdiction of the person of the respondent, and, second, to give it jurisdiction of the subject matter of the appeal; and since jurisdiction over the subject matter can never be conferred by consent, the voluntary appearance of the respondent must be made within the time in which service of notice upon him would be effectual to vest jurisdiction of the appeal in the appellate court. To authorize an appearance to be made thereafter would be to confer jurisdiction by consent.[16]

What constitutes appearance.—A party makes a general appearance and waives service of notice of appeal upon him by entering into stipulations as to the proceedings on appeal, as by entering into a stipulation to the omission of certain matters from the transcript, or that the appeal shall abide the result of another appeal.[17] So, also, a stipulation reciting the due perfection of an appeal is an admission of due service of a properly addressed notice of appeal upon all parties signing such stipulation.[18]

§ 118. Necessity Under Alternative Method.—No service of notice of appeal is necessary under the alternative method of taking appeals, as such service is specifically

14. Hibernia Sav. & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175 (applying the rule to a waiver of service by a party to the action not named in the address).

15. In re Castle Dome Mining & Smelt. Co., 79 Cal. 246, 21 Pac. 746.

16. Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225; Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74.

17. Valley Lumber Co. v. Struck, 146 Cal. 266, 80 Pac. 405.

18. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

dispensed with by the code.[19] The code provision is as follows:

"This notice [of appeal] need not be served upon any of the parties to the action or the proceeding, or their representatives or attorneys, but when filed within the time herein specified it shall, without further action on the part of the appellant, transfer the cause for decision and determination to the higher court."[20]

The main design here shown is to compel the prevailing parties to look to the files to ascertain whether or not an appeal has been taken, and to avoid the necessity previously imposed upon the appellant of determining which of the parties were adverse to him upon his proposed appeal, and of finding them and serving upon them the required notice, at the peril of losing his appeal if he made a mistake in his endeavor to do so.[1] The filing of a notice stating all that is specifically mentioned in the section as parts of such notice will constitute a valid appeal as to all the parties to the action, without any further action on the part of the appellant.[2] And the

19. Estate of Stough, 173 Cal. 638, 161 Pac. 1; Martin v. Becker, 169 Cal. 301, Ann. Cas. 1916D, 171, 146 Pac. 665; Fraser v. Sheldon, 164 Cal. 165, 128 Pac. 33; Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Potrero Neuvo Land Co. v. All Persons Claiming, 155 Cal. 371, 101 Pac. 12; Mitchell v. California & O. S. S. Co., 154 Cal. 731, 99 Pac. 202; Estate of McPhee, 154 Cal. 385, 97 Pac. 878; Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 179 Pac. 447; Blake & Bilger Co. v. Chappell (Cal. App.), 186 Pac. 823; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Watson v. Dingley, 14 Cal. App. 88, 111 Pac. 106; John Brickell Co. v. Sutro, 11 Cal. App. 460, 105 Pac. 948, 949; Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 103 Pac. 946; Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297.

20. Code Civ. Proc., § 941b.

1. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Slayden v. O'Dea (Cal. App.), 189 Pac. 1062.

2. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69 (per Shaw, J.); Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Blake & Bilger Co. v. Chappell (Cal. App.), 186 Pac. 823.

failure of the prevailing party to examine the files is immaterial.[3]

On Whom Notice must be Served.

§ 119. In General.—The notice of appeal under the regular method must be served on "the adverse party or his attorney."[4] A compliance with this requirement is necessary to the jurisdiction of the appellate court, unless, as has been stated, such service is waived or rendered immaterial by a compliance with the provisions of the code relating to appeals by the alternative method.[5] If there are several "adverse parties," notice must be served on all, or their attorneys if they appeared by attorney. If such service is not made, the appellate court acquires no jurisdiction over the adverse party not served. Any judgment or order made with reference to the judgment or order appealed from would be ex parte and could not affect his rights or be binding upon him.[6] Not only that, but the appellate court in such case acquires no jurisdiction over the appeal itself, and cannot hear the appeal even as between the parties served.[7]

3. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

4. Code Civ. Proc., § 940; O'Rourke v. Finch, 8 Cal. App. 263, 96 Pac. 784. See In re Chope, 112 Cal. 630, 44 Pac. 1066 (the Insolvent Act, § 67, contained a similar provision).

5. See supra, § 105.

6. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; McLeod v. Davis, 1 Cal. Unrep. 766.

7. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182; Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983 (contractor as adverse party to appeal in mechanic's lien suit); Estate of Young, 149 Cal. 173, 85 Pac. 145; Bair v. Watkins, 130 Cal. 540, 62 Pac. 929; Bowering v. Adams, 126 Cal. 653, 59 Pac. 134 (action to quiet title to water); Estate of Scott, 124 Cal. 671, 57 Pac. 654; Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Miller v. Richards, 83 Cal. 563, 23 Pac. 936 (where notice of appeal from an order vacating a decree of foreclosure was not served on an intervener, the pur-

Where an appeal is taken from the whole judgment, the appellate court has no jurisdiction to modify the judgment in such a manner as shall affect the rights of the parties on whom notice of appeal has not been served, as such rights have been ascertained and finally determined by the judgment.[8] But if the omitted party would not be affected by a reversal or modification of the judgment appealed from, the court, notwithstanding the failure to serve a party, will decide the case with reference to the interests of the parties before it, so far as it may be done without affecting the interests of others.[9] In other words, the persons whose interests will not be affected by the modification are not adverse parties and need not be served.[10] The rules governing the question who must be served with notice of appeal are not identical with those which control the question as to who may have the right to appeal.[11] In the first place, the person served must be a party. Service of notice of appeal upon one who has been brought into an action by a void order is without legal efficacy, as he is not a party.[12]

chaser at the sale); Millikin v. Haughton, 75 Cal. 539, 17 Pac. 641; Williams v. Santa Clara Min. Assn., 66 Cal. 193, 5 Pac. 85; Reed v. Allison, 61 Cal. 461 (overruled on other grounds in Luck v. Luck, 83 Cal. 574, 23 Pac. 1035); Senter v. De Bernal, 38 Cal. 637; Porter v. Lassen County Land & Cattle Co., 6 Cal. Unrep. 183, 55 Pac. 395 (second mortgagee); In re Walkerley's Estate, 5 Cal. Unrep. 5, 40 Pac. 13; Luco v. Commercial Bank, 2 Cal. Unrep. 549, 8 Pac. 274; Bernal v. Bernal, 1 Cal. Unrep. 581 (in partition suit); Ford v. Cannon, 5 Cal. App. 185, 89 Pac. 1071; Koyer v. Benedict, 4 Cal. App. 48, 87 Pac. 231.

8. Vincent v. Collins, 122 Cal. 387, 55 Pac. 129; Williams v. Santa Clara Min. Assn., 66 Cal. 193, 5 Pac. 85; De Arnaz v. Jaynes, 4 Cal. Unrep. 226, 34 Pac. 223.

9. Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225; Estate of Young, 149 Cal. 173, 85 Pac. 145; Southside Improvement Co. v. Burson, 147 Cal. 401, 81 Pac. 1107; Estate of Pendergast, 143 Cal. 135, 76 Pac. 962; Williams v. Santa Clara Min. Assn., 66 Cal. 193, 5 Pac. 85.

10. See infra, § 120.

11. Estate of McDougald, 143 Cal. 476, 77 Pac. 443. See supra, § 52.

12. Higgins v. Kay, 168 Cal. 468, 143 Pac. 710 (where the order of substitution was void for lack of due process of law, service of notice of appeal is ineffectual).

But it is not always necessary that he be a party in the strict sense of the term. He may be a quasi party. For example, where a defendant before filing an answer moves on notice for an order substituting certain persons as defendants in his stead, and then on denial of his motion declines to amend, and judgment by default is rendered against him, the persons sought to be substituted are adverse parties entitled to notice of appeal. Although not named as parties to the judgment as it stands, they become quasi parties to the action so far as their rights were affected by the granting or refusal of the motion when they were served with notice of motion for the order of substitution.[13] In the next place, the notice of appeal must be served upon the "adverse" party,[14] or if he has appeared by his attorney, then upon his attorney.[15] It is obvious that service need not be made upon one who is not an adverse party.[16] As will be shown later, it is not necessary that service be made upon the party personally,[17] and where the respondent is a nonresident of the state who appeared in person without an attorney, service should be made on the clerk for him, pursuant to section 1015 of the Code of Civil Procedure.[18]

Service on party convicted of a felony.—The conviction of a felony which does not involve life imprisonment does not render the party civiliter mortuus so as to prevent service of notice of appeal on him and require the dismissal of an appeal.[19]

§ 120. **Who is an "Adverse Party."**—The code uses the term "adverse party" in several connections. It requires service upon the adverse party of the notice of

13. Toy v. San Francisco & S. F. R. R. Co., 75 Cal. 542, 17 Pac. 700.

14. See infra, § 120, as to who is an "adverse party."

15. See infra, § 127.

16. Kenney v. Parks, 120 Cal. 22, 52 Pac. 40.

17. See infra, §§ 130, 131, 132.

18. Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013.

19. Brown v. Mann, 68 Cal. 517, 9 Pac. 549; Id., 2 Cal. Unrep. 627, 9 Pac. 545.

intention to move for a new trial,[20] and of a draft of a bill of exceptions.[1] And the rules determining who is an adverse party in either proceeding are applicable to the others.[2]

An "adverse party" within the meaning of section 940 of the Code of Civil Procedure is defined to be a party to the record whose interest in the subject matter of an appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken,[3] or, where the appeal is from part of a judgment or order, by a reversal or modification of the part appealed from,[4] and this, irrespective of the

20. See NEW TRIAL.

1. See infra, § 333, as to service of bill of exceptions.

2. Estate of Young, 149 Cal. 173, 85 Pac. 145; Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730.

3. Fearon v. Fodera, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200; Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182; Estate of Young, 149 Cal. 173, 85 Pac. 145 (appeal from order dismissing petition for partial distribution); Lamb v. Hall, 147 Cal. 44, 81 Pac. 288; Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; Mohr v. Byrne, 132 Cal. 250, 64 Pac. 257; Bowering v. Adams, 126 Cal. 653, 59 Pac. 134 (appeal involving right to surplus water); Vincent v. Collins, 122 Cal. 387, 55 Pac. 129 (assignee in insolvency); Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; Bullock v. Taylor, 112 Cal. 147, 44 Pac. 447; Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Toy v. San Francisco & S. F. R. R. Co., 75 Cal. 542, 17 Pac. 700; Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641; Williams v. Santa Clara Min. Assn., 66 Cal. 193, 5 Pac. 85; Senter v. De Bernal, 38 Cal. 637; De Arnaz v. Jaynes, 4 Cal. Unrep. 226, 34 Pac. 223 (co-owner of property mortgaged); Jackson v. Superior Court, 20 Cal. App. 638, 129 Pac. 946 (coparty as adverse party); Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 103 Pac. 946.

4. Bowering v. Adams, 126 Cal. 653, 59 Pac. 134; Roylance v. San Luis Hotel Co., 74 Cal. 273, 20 Pac. 573; Miller v. Rea, 71 Cal. 405, 12 Pac. 431. (On an appeal from such portion of an interlocutory decree in partition as relates to a particular undivided interest in the land in controversy, the notice need only be served on the parties interested adversely to the appellant in the undivided interest involved in the appeal.) Williams v. Santa Clara Min. Assn., 66 Cal. 193, 5 Pac. 85.

question whether he appears upon the face of the record in the attitude of plaintiff, or defendant, or intervener.[5] An adverse party is a party whose interest in relation to the subject of the appeal is in conflict with a reversal of the order or decree appealed from, or the modification sought by the appeal;[6] one who appears, by the record, to be interested in the judgment so that he will be affected by its reversal[7] or modification,[8] or whose rights would or might be affected by a reversal of the judgment or order appealed from.[9] The question is whether the judgment gives a party something which will be taken away by a reversal.[10]

§ 121. **Showing in Record.**—It is not every person who may be affected by a reversal or modification of a judgment or order who is an "adverse party" entitled to service of notice of appeal. While the rule is thus broadly stated in a number of cases, this rule must be construed in connection with another rule that only the record can be examined for the purpose of determining who are such adverse parties.[11] In other words, the "adverse party" upon whom a notice of appeal is to be served is the party who appears by the record to be adverse,[12] and the bur-

5. Senter v. De Bernal, 38 Cal. 637.

6. Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983; Green v. Berge, 105 Cal. 52, 45 Am. St. Rep. 25, 38 Pac. 539; Senter v. De Bernal, 38 Cal. 637, quoting Thompson v. Ellsworth, 1 Barb. Ch. (N. Y.) 624.

7. Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983 ("parties to the controversy whose interests would be injuriously affected by a reversal of the judgment"); Kenney v. Parks, 120 Cal. 22, 52 Pac. 40; Foley v. Bullard, 97 Cal. 516, 32 Pac. 574 (one whose rights will be adversely affected by a reversal of the judgment).

8. Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; Terry v. Superior Court, 110 Cal. 85, 42 Pac. 464; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951; O'Kane v. Daly, 63 Cal. 317.

9. Vincent v. Collins, 122 Cal. 387, 55 Pac. 129.

10. Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719.

11. See cases cited infra, this section.

12. Potrero Neuvo Land Co. v. All Persons Claiming, 155 Cal. 371,

den is on the party moving to dismiss the appeal to show from the record that a party not served was adverse.[13] The record to be considered for this purpose is the record of the proceedings in which the appeal is taken.[14] Whether a party to the action is adverse to the appellant must be determined by their relative positions on the record and the averments in their pleadings, rather than from the manner in which he expressed his wishes at the trial or from any presumption to be drawn from the relation of the parties to each other, or to the subject matter of the action in matters outside of the action. If his position on the record makes him nominally adverse, he must be so considered for the purpose of an appeal from a judgment thereon.[15] The fact that a defendant, for example, makes a motion to dismiss a motion of the other defendants, does not take away the adverse character he holds to the plaintiff.[16] So, also, the fact that the judgment or order may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect to the prejudice of one who is not a party thereto, does not entitle such person to be made a party to the appeal, and require service of notice of appeal upon him.[17]

101 Pac. 12 (under McEnerney Act); Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080; Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225; Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; Estate of Young, 149 Cal. 173, 85 Pac. 145; Estate of Carpenter, 146 Cal. 661, 80 Pac. 1072 (appeal from order settling executor's accounts); Estate of McDougald, 143 Cal. 476, 77 Pac. 443; Mohr v. Byrne, 132 Cal. 250, 64 Pac. 257; Kenney v. Parks, 120 Cal. 22, 52 Pac. 40; In re Bullard's Estate, 114 Cal. 462, 46 Pac. 297; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082; Terry v. Superior Court, 110 Cal. 85, 42 Pac. 464; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; McKenzie v. Hill, 9 Cal. App. 78, 98 Pac. 55; O'Rourke v. Finch, 8 Cal. App. 263, 96 Pac. 784.

13. Potrero Neuvo Land Co. v. All Persons Claiming, 155 Cal. 371, 101 Pac. 12; Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74.

14. In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082.

15. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Ford v. Cannon, 5 Cal. App. 185, 89 Pac. 1071.

16. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

17. Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; In re

§ 122. Application of Rule.—The question as to who is an adverse party in particular actions is treated in this work in the particular titles. A few illustrations will be given here for the purpose of showing the general application and limitations of the rule.[18] A defaulting mortgagor is an adverse party to an appeal from a judgment of foreclosure taken by a subsequent lienholder who contests the validity of the mortgage, for if the appellant's contention is sustained, the mortgagor will be left personally liable on the note.[19] So, also, a mortgagor is an adverse party to an appeal by a claimant of an undivided interest in the premises who contends that the mortgage is not a lien upon his interest and that a judgment foreclosing it upon the entire premises is erroneous, as a modification of the judgment in this respect would tend to increase his per-

Ryer's Estate, 110 Cal. 556, 42 Pac. 1082.

18. Quist v. Sandman, 154 Cal. 748, 99 Pac. 204 (contractor as adverse party to judgment foreclosing lien for services); Estate of Carpenter, 146 Cal. 661, 80 Pac. 1072 (an attorney need not be served with notice of appeal from an order settling executor's accounts); Estate of Bell, 125 Cal. 539, 58 Pac. 153 (a purchaser at an executor's sale is an adverse party to an appeal from an order confirming the sale); Hibernia Sav. & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175 (upon an appeal from an order refusing to vacate a decree of foreclosure, a holder of a second lien whose lien is directed to be paid out of the proceeds of the sale after the satisfaction of the mortgage is an adverse party); Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758 (holding grantee of mortgagee to be an adverse party to an appeal from that portion of a foreclosure decree giving priority to other liens, where the modification sought by the appellant would increase his personal liability. But he is not an adverse party to an appeal seeking to have the decree modified so as to determine that the lien claimants had no lien upon the premises, as the reversal would not injuriously affect him. Followed in Warren v. Ferguson, 108 Cal. 535, 41 Pac. 417); Brown v. Rouse, 93 Cal. 237, 28 Pac. 1044 (holding a defendant dismissed from the action who would not be affected by a reversal of the judgment between the other parties was not an adverse party); Gardner v. Stare, 6 Cal. Unrep. 777, 66 Pac. 3 (in an action concerning the separate property of a wife, the husband who had no interest therein and who defaulted is not an adverse party); Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543 (holding guarantor not an adverse party).

19. Koyer v. Benedict, 4 Cal. App. 48, 87 Pac. 231.

sonal liability if his interest should sell for less than the amount of the mortgage.[20] But upon an appeal from an order granting a writ of assistance, to put a purchaser at a foreclosure sale in possession, a subsequent lienholder whose lien is directed to be paid out of the proceeds of the foreclosure sale is not an adverse party to such appeal.[1] Where an insurance company defendant appeals from a judgment on an insurance policy which directs that the amount of a mortgage be satisfied out of the judgment, the mortgagee, who was made a codefendant, is an adverse party, as a reversal would deprive him of the fund provided for the payment of the mortgage. It is no answer to say that he may ultimately recover the money in another action directly against the insurance company or from the mortgage.[2] So, also, a vendor who has taken a mortgage from a subsequent purchaser of land is an adverse party to an appeal by such subsequent purchaser directing specific performance of a prior contract of sale and a payment of the mortgage out of the judgment.[3]

When in proceedings supplementary to execution the judgment debtor is not a participant, he is not a party to the record and need not be served with notice of appeal from the order against the garnishee.[4]

§ 123. Service on Coparties.—As indicated above, a nonappealing coparty is an adverse party if his interests would be affected by a reversal or modification of the judgment appealed from.[5] Where an execution running

20. Bair v. Watkins, 130 Cal. 540, 62 Pac. 929.

1. Hibernia Sav. & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175.

2. Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719.

3. Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74.

4. McKenzie v. Hill, 9 Cal. App. 78, 98 Pac. 55.

5. Sprague v. Walton, 145 Cal. 228, 78 Pac. 645 (an executor who is made defendant on his refusal to join with his coexecutor as plaintiff but who is not mentioned in the judgment is not an adverse party to an appeal by another defendant); Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103 (holding a partner an adverse party to appeal

against several parties is quashed upon motion of part of the defendants, all the execution defendants are adverse parties to an appeal from the order, even those who do not join in the motion, as the reversal of the judgment would have the effect of reviving the execution against all of them.[6] But defendants in whose favor a judgment for costs is rendered are not adverse parties to an appeal from a judgment against the remaining defendants, as the only possible result of a successful appeal is either a new trial as to the appellant or a joint judgment in favor of both.[7] Defendants in a suit to quiet title who filed disclaimers in the action and against whom no judgment is rendered are not adverse parties to an appeal from a judgment for the plaintiff. The judgment being silent as to them in so far as their interests no judgment

by a plaintiff from a judgment of dismissal where a reversal would revive the issue of ownership of land as between the partners, and this though he joined with the appellant in opposing the motion for dismissal); Foley v. Bullard, 97 Cal. 516, 32 Pac. 574 (an appeal from judgment foreclosing a street assessment, followed in Worth v. Emerson, 3 Cal. App. 158, 85 Pac. 664); Hinkel v. Donohue, 88 Cal. 597, 26 Pac. 374 (where, before service of process or appearance, the plaintiff files a dismissal of his action, a defendant who subsequently files an answer and cross-complaint may appeal from a judgment of dismissal subsequently entered without serving notice on the other defendants who do not appeal, as a reversal would not affect the judgment against them); Jackson v. Brown, 82 Cal. 275, 23 Pac. 142 (in an action for damages for trespass and injunction in which judgment is rendered by consent, one of the defendants may appeal from an order denying his motion to vacate the judgment without serving notice on his codefendants, as they are not adverse parties); Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641; Randall v. Hunter, 69 Cal. 80, 10 Pac. 130; Butte County v. Boydstun, 68 Cal. 189, 8 Pac. 835 (condemnation suit); O'Kane v. Daly, 63 Cal. 317; Senter v. De Bernal, 38 Cal. 637; Jackson v. Superior Court, 20 Cal. App. 638, 129 Pac. 946 (an action for labor done in which no judgment was rendered against defendant not served). See Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182, holding that in dismissing an appeal on the ground that notice of appeal has not been served on a coparty, the court necessarily decides that such coparty is an "adverse party" within the meaning of the code.

6. Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641.

7. Green v. Berge, 105 Cal. 52, 45 Am. St. Rep. 25, 38 Pac. 539.

at all.[8] Inasmuch as the common-law rule has been superseded and it is permissible in this state to reverse and vacate a judgment against joint tort-feasors as to the one against whom error has been committed and continue the judgment in full force and effect as to the remaining defendants who have not appealed, nonappealing defendants are not adverse parties where the error assigned does not affect them, and the judgment, if reversed, will not be vacated as to them.[9]

§ 124. Service on Parties Defaulting or not Appearing. Section 650 of the Code of Civil Procedure as amended in 1909 provides:

"No . . . notice of appeal . . . need be served upon any party whose default has been duly entered or who has not appeared in the action or proceeding."

Section 1014 of the same code provides:

"Where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail."

A defendant who has not been served with process, or appeared in the action, cannot be affected by any judgment rendered therein or by any reversal or modification thereof on appeal, and therefore he is not an adverse party entitled to notice of appeal.[10] Under this rule, service of notice need not be made upon fictitious defendants who have not been served or appeared in the

8. Fearon v. Fodera, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

9. Fearon v. Fodera, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

10. Peck v. Agnew, 126 Cal. 607, 59 Pac. 125; Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176 (citing Code Civ. Proc., § 1014); Terry v. Superior Court, 110 Cal. 85, 42 Pac. 464; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732 (holding that a partner who was not served, and who did not appear, was not an adverse party); Blake & Bilger Co. v. Chappell (Cal. App.), 186 Pac. 823; Nason v. John, 1 Cal. App. 538, 82 Pac. 566. See Estate of Pendergast, 143 Cal. 135, 76 Pac. 962, conceding but not deciding the point.

action.[11] The rule, however, has no application to a case where a party is made defendant for want of consent to be a coplaintiff, and where judgment has been given in favor of him, though he has not appeared or pleaded.[12]

A defendant against whom a default is entered is not an adverse party to an appeal from a judgment against the other defendants which cannot affect his interests.[13] Where a defendant to an action on a promissory note makes default, and, after trial, judgment is rendered against him and a codefendant,—against one on his default and against the other on the verdict,—the defaulting defendant is not an adverse party to an appeal by his codefendant, as the reversal would not set aside the default.[14] In an action to foreclose a mortgage, a default of defendants other than the mortgagor is an admission of an allegation that their interest is subject to the lien, and where the judgment merely forecloses their interest in the property, it is evident that they cannot be affected by any reversal or modification of the judgment.[15]

§ 125. In Proceedings on New Trial.—An adverse party to a motion for a new trial is entitled to service

11. Benson v. Bunting, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991.

12. Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719.

13. Fearon v. Fodera, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200; McKeany v. Black (Cal.), 46 Pac. 381. See Matter of Castle Dome Min. etc. Co., 79 Cal. 246, 21 Pac. 746 (holding a corporation that had suffered default in an insolvency proceeding was an adverse party, as the judgment dismissing the action was practically a judgment in its favor and could not be reversed without depriving it of an apparent advantage. See French v. McCarthy, 110 Cal. 12, 42 Pac. 302, holding that a defendant who does not appear to have answered and against whom no judgment was rendered is not an adverse party to an appeal from a judgment against his codefendant.

14. Randall v. Hunter, 69 Cal. 80, 10 Pac. 130 (where the default of a defendant is in effect an admission that he was bound severally as well as jointly, it was held that a reversal would not do away with such default, and as long as it stands, any judgment rendered on appeal would not affect the judgment against such defaulting defendant).

15. Boob v. Hall, 107 Cal. 160, 40 Pac. 117.

of notice of appeal from the order on the motion.[16] On an appeal from an order denying a new trial, when allowed, only the parties to the motion upon which the order was made were necessary parties to the appeal.[17] Persons not served with notice of intention and who did not become parties to the proceeding are not adverse parties and need not be served with notice of appeal, as they are not parties to the record of the proceeding in which the appeal is taken.[18] When a motion for a new trial is made by several defendants, the plaintiff to whom the motion is directed is the adverse party on such motion, and where only one defendant appeals from the order refusing the motion, it is not necessary to serve notice upon the other defendants who joined in the motion.[19] The necessity of serving a notice of appeal upon a respondent who is an adverse party is not obviated by the death of such party; and in such event service must be made upon his proper representative.[20]

§ 126. Rule Applied to Probate Proceedings.—The rule that only parties to the record are adverse parties has been applied to appeals in probate proceedings. Thus, it has been held that a creditor who has not appeared in a proceeding to settle an administrator's account is not an adverse party to an appeal, though the object of the

16. Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080; Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225; People v. Center, 66 Cal. 551, 572, 5 Pac. 263, 6 Pac. 481 (affirming order denying new trial because notice of appeal was not served on all adverse parties).

17. Barnhart v. Edwards, 111 Cal. 428, 44 Pac. 160; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88.

18. Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719 (the question as to whether other parties should have been made parties to the motion, while good reason for denying the motion and affirming such order on appeal, is not involved upon a motion to dismiss the appeal from such an order); Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; Estate of Calkins, 112 Cal. 296, 44 Pac. 577; In re Ryer's Estate, 110 Cal. 556, 42 Pac. 1082.

19. O'Rourke v. Finch, 8 Cal. App. 263, 96 Pac. 784.

20. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225.

appeal is to vacate an order allowing his claim, for the reason that though vitally interested, he was not a party to the proceedings, in the trial court.[1] So, also, for the same reason, where certain creditors file objections to an administrator's account and the administrator appeals from an order surcharging his accounts, it is unnecessary to serve creditors who have not appeared. That a person interested in an estate, although his name and his interest is disclosed on the face of the record, is not necessarily a party to the cause or proceeding, is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. In a proceeding to probate a will, any person interested, whether as devisee, legatee or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet, it would not be contended that an heir, devisee or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. As to the petition for administration, there may be many persons who are entitled to letters and who are interested in the matter of appointment. But if they fail to appear or contest the right of the petitioner, it is manifest that they cannot be considered parties. Upon the settlement of an account, every creditor, heir, legatee or devisee is a person interested, and as such has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account, or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims, do not, ipso facto, make them parties to the proceeding.[2] Devisees are adverse parties who have ap-

1. Estate of Bullard, 114 Cal. 462, 46 Pac. 297.

2. Estate of McDougald, 143 Cal. 476, 77 Pac. 443 (in the light of the authorities upon the settlement of the account of an executor or administrator, only those persons interested in the estate who appear in the superior court and make some objection or exception to the

peared and taken part in the proceeding in the lower court.[3]

§ 127. Service on Counsel.—Section 940 of the Code of Civil Procedure requires service of the notice of appeal on the adverse party "or his attorney."[4] Such notice is not process requiring personal service upon the party himself for the purpose of bringing him before the court.[5] Therefore, section 940 is to be read in connection with section 1015 of the code, providing that in all cases where a party has an attorney in the action or proceeding, the service of papers when required must be upon the attorney instead of the party. The latter provision controls the former, and when the adverse party has an attorney, service must be made upon the attorney,[6] and appeals have been dismissed for violation of this rule.[7]

account, or in some way make themselves parties of record to that proceeding, are necessary parties to an appeal from any order made therein, and that other persons equally interested and equally affected by the order, but who do not see fit to make any contest or objection to the account, or to any matters stated therein, need not be served with notice of appeal). See Estate of Scott, 124 Cal. 671, 57 Pac. 654 (holding a legatee who appeared is an adverse party to an appeal from an order admitting a will to probate), and In re Delaney, 110 Cal. 563, 42 Pac. 981 (holding upon an appeal from an order settling the account of an executor, that the executor is the only party upon whom it is necessary to serve a notice of appeal).

3. Estate of Young, 149 Cal. 173, 85 Pac. 145.

4. Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594 (holding service on the party after service on counsel is a nullity and does not extend the time to file an undertaking); Estate of Scott, 124 Cal. 671, 57 Pac. 654 (holding that service upon an attorney appointed to represent absent heirs and legatees in a probate proceeding is sufficient); Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175 (service "may" be made upon the attorney of the appellant); Beach v. Cooper, 72 Cal. 99, 13 Pac. 161 (holding notice "was properly served" on the attorney); Coulter v. Stark, 7 Cal. 244; Welton v. Garibardi, 6 Cal. 245.

5. Hibernia Sav. & Loan Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175.

6. Linforth v. White, 129 Cal. 188, 61 Pac. 910; Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Abrahms v. Stokes, 39 Cal. 150; People v. Alameda Turnpike R. Co., 30 Cal. 182; Jones v. McGarvey, 6 Cal. Unrep. 277, 56 Pac. 896. See infra, § 127, as to effect of death of party on authority of attorney.

7. Abrahms v. Stokes, 39 Cal. 150; Jones v. McGarney, 6 Cal. Unrep. 277, 56 Pac. 896.

The attorney here referred to is the attorney of record of the party, and service upon the attorney who signed the original pleading of a party is sufficient, in the absence of a substitution of attorneys, though another attorney signed the amended pleading.[8] Indeed, service on an attorney who is not the attorney of record and who has not been substituted is ineffectual.[9] Where the so-called special appearance of the party defendant in an action is in reality a general appearance, the notice of appeal may be served on the attorney representing the defendant on such special appearance, in the absence of any substitution of attorneys.[10] If the respondent has two counsel of record, service may be made upon either.[11]

§ 128. Effect of Death of Party to be Served.—The necessity of serving notice of appeal upon a respondent who is an adverse party is not obviated by the death of such party.[12] If any adverse party has died, service must be made upon the personal representative of the decedent,[13] after he has been made a party to the action. Service upon the personal representative before he has been substituted as a party to the suit is ineffectual, because until that time he is as much a stranger to the proceedings as if he were not the executor or administrator.[14] If the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost.[15] He cannot save his appeal by serving the attor-

8. Lacoste v. Eastland, 117 Cal. 673, 49 Pac. 1046.

9. Whittle v. Renner, 55 Cal. 395.

10. Thompson v. Alford, 128 Cal. 227, 60 Pac. 686. As to general and special appearances, see APPEARANCE.

11. Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050.

12. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225 (citing Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; Judson v. Love, 35 Cal. 463).

13. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225.

14. Judson v. Love, 35 Cal. 463.

15. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225. And see cases cited infra, note 16,

ney of the party,[16] unless authorized by statute,[17] or circumstances estopping the parties from raising the objection exist. The authority of the attorney to act is terminated by the death of his client, and service of notice on him thereafter is ineffectual.[18]

Requisites of Service and Time Therefor.

§ 129. Time of Service.—Under the Practice Act an appeal was taken by filing with the clerk a notice of appeal and serving a copy of the notice upon the adverse party or his attorney. The time or order of service was not expressly declared, but as the service was of a copy, it was assumed and held by the court that the notice should be served on the same day as the filing or subsequent thereto.[19] And in view of the statutes relating to the undertaking on appeal, it was held that the notice, if not served on the same day as the filing of the notice, must be served before or at the time of the filing of the undertaking. The statute provided for no special notice of filing the undertaking, as the respondent was required

this section. See supra, § 117, as to extension of time to appeal in such case.

16. Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Sheldon v. Dalton, 57 Cal. 19; Shartzer v. Love 40 Cal. 93; Judson v. Love, 35 Cal. 463.

17. Lacoste v. Eastland, 117 Cal. 673, 49 Pac. 1046 (under section 763 of the Code of Civil Procedure, providing that partition suits shall not be delayed by reason of the death of a party, but that the attorney who has appeared for a party may continue to represent his interest, notice of appeal may be served on the attorney after the death of the party).

18. See cases cited in note 16, supra. See ATTORNEYS AT LAW.

19. Lynch v. Dunn, 34 Cal. 518; Foy v. Domec, 33 Cal. 317; Boston v. Haynes, 31 Cal. 107; Wright v. Ross, 26 Cal. 262 (holding service is not premature where made only five minutes before the notice was filed, the service and filing being regarded as a continuous transaction. This case was followed in People v. Schmitz, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717, 94 Pac. 407, 419, in construing Pen. Code, § 1240); Warner v. Holman, 24 Cal. 228; Buffendeau v. Edmondson, 24 Cal. 94; Hastings v. Halleck, 10 Cal. 31. See Towdy v. Ellis, 22 Cal. 650, as to waiver of objection.

to except to the sureties within five days of the "filing" of the undertaking; this holding was necessary to secure to the respondent the full time allowed him for the purpose of excepting to the sureties.[20]

Under the code.—Section 940 of the Code of Civil Procedure as originally enacted required the filing of the notice of appeal, and the service of the notice to be effected at the same time, that is to say, on the same day.[1] This section was amended in 1874, and it has not since been changed. As amended the section is substantially the same as the Practice Act, save that it provides that "the order of service is immaterial," and requires the undertaking to be filed within five days after the "service" of the notice of appeal, instead of after "filing" as required by the Practice Act. The phrase "the order of service is immaterial" is the equivalent of "whether the service precede or follow the filing of the notice is immaterial."[2] And it has been held a number of times that service of the notice may precede the filing.[3] Not only that, but there is no particular time after service within which the notice must be filed,[4] provided, that

20. Sweeney v. Reilly, 42 Cal. 402; Buffendeau v. Edmondson, 24 Cal. 94; Hastings v. Halleck, 10 Cal. 31; Brooks v. Lubbock, 1 Cal. Unrep. 210. See Columbet v. Pacheco, 46 Cal. 650, holding that as the statute did not provide for notice of filing of the undertaking, it was intended that the service of the notice of appeal should itself operate as such notice. Section 948 of the code now provides for notice of filing of the undertaking. Furthermore, a failure of the sureties to justify does not, under the present practice, render the appeal ineffectual. See infra, § 160. Therefore, the reasoning of these cases is not applicable to the present practice.

1. People v. Ah Yute, 56 Cal. 119; Dinan v. Stewart, 48 Cal. 567; Columbet v. Pacheco, 46 Cal. 650.

2. Boyd v. Burrel, 60 Cal. 280.

3. San Francisco Law & C. Co. v. State, 141 Cal. 354, 74 Pac. 1047; Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998; Galloway v. Rouse, 63 Cal. 280; Boyd v. Burrel, 60 Cal. 280.

4. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 Pac. 1047 (holding notice filed eleven days after service is in time); Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998 (holding that the notice may be filed five days after service); Hewes v. Carville Mfg. Co., 62 Cal. 516 (where

it is filed before the expiration of the time for appeal.[5] An appeal is not perfected until all the things required by the statute to be done have been done; in other words, until the notice of appeal has been both filed and served. A failure to do either of these things within the time within which a party has the right to appeal is fatal to the taking of the appeal, though the other has been done. Therefore, a failure to serve a notice until after the expiration of the statutory period is fatal to the appeal, though the notice was filed within the time limited.[6]

§ 130. Manner of Service Generally.—Service of a notice of appeal may be personal, by delivery to the party or attorney on whom service is required to be made,[7] or it may be made by leaving a copy at the office or residence of such attorney or party, as provided in section 1011 of the Code of Civil Procedure,[8] or by mail, as provided in sections 1012 and 1013 of the same code,[9] or in the case of nonresidents, it may be made as provided in section 1015 of the code,[10] provided always the circumstances exist authorizing service in this manner.

The "delivery" which constitutes a personal service under section 1011 of the Code of Civil Procedure need not be made by the individual who is attempting to make

the notice was served on August 30th and filed September 18th).

5. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 Pac. 1047.

6. Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 Pac. 1047; W. J. White Co. v. Winton (Cal. App.), 183 Pac. 277; Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297. See, also, Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475, in which on the same principle, notwithstanding the former rule that an appeal taken before entry of the judgment was premature, it was held that an appeal is not premature when the notice of appeal is filed on the day the judgment is entered, notwithstanding the notice was served on the preceding day. See infra, §§ 164–175, as to time in which to appeal.

7. Code Civ. Proc., § 1011; Cunningham v. Warnekey, 61 Cal. 507; Whittle v. Renner, 55 Cal. 395; Columbet v. Pacheco, 46 Cal. 650. See infra, this section.

8. Linforth v. White, 129 Cal. 188, 61 Pac. 910. See infra, § 131.

9. See infra, § 132.

10. See supra, § 119.

the service, but it can be effected through a clerk or messenger, or through any agency by which a "delivery" can be made, and when a notice is so delivered, the service becomes a personal service. The person seeking to make the service can avail himself of any agency, such as an express company, or the instrumentality of the postoffice department, with as much effect as if he had employed any other messenger. The fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service does not require that the service be made by mail, or preclude a personal service.[11] If the person to be served refuses to receive the notice, the notice may be left on a table in his presence.[12]

§ 131. Service by Leaving Copy.—In addition to service by delivery, service may be made upon the attorney as follows:

"If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of not less than eighteen years of age, if his residence is in the same county with his office; and if his residence is not known, or is not in the same county with his office, or being in the same county it is not open, or there is not found thereat any person of not less than eighteen years of age, then by putting the same, inclosed in a sealed envelope, into the postoffice directed to such attorney at his office, if known; otherwise to his residence, if known; and if neither his office nor his residence is

11. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8, quoted in part in East Side Canal & Irr. Co. v. Superior Court, 30 Cal. App. 528, 532, 158 Pac. 773.

12. Nathan v. Sutphen, 68 Cal. 267, 9 Pac. 110.

known, then by delivering the same to the clerk of the court for the attorney."[13]

Under this provision a notice left in a conspicuous place upon the office desk of the attorney, in the presence of the person in charge of the office at the time and after calling his attention to the notice thus served, is, in contemplation of law, left "with a person having charge of the office."[14] When service is made upon a party, "It may be made by leaving the notice at his residence, between the hours of eight in the morning and six in the evening, with some person of not less than eighteen years of age,[15] and, if his residence is not known, by delivering the same to the clerk of the court for such party."[16]

§ 132. Service by Mail.—It is clear that notices of appeal may be served by mail.[17] Such service is termed a substituted service, and is intended to take the place of, and be equivalent in point of law and effect to, a personal service.[18] But as this is a substituted service, it is incumbent upon anyone who would avail himself of this mode of service to have it clearly appear upon the record that the case is one in which such service is permitted, and that the mode pointed out by the statute for making such service has been strictly followed.[19] Under the code provisions authorizing the service of notices by mail, it is permissible to serve a notice of appeal by mail when the person making the service and the person on whom it is to be made reside or have their offices in different places, and when there is a regular mail communication between the place where it is mailed and the place to

13. Code Civ. Proc., § 1011, subd. 1.

14. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

15. Code Civ. Proc., § 1011, subd. 2; Koyer v. Benedict, 4 Cal. App. 48, 87 Pac. 231.

16. Code Civ. Proc., § 1011, subd. 2.

17. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8; Luck v. Luck, 83 Cal. 574, 23 Pac. 1035.

18. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8.

19. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8; Moore v. Besse, 35 Cal. 183; People v. Alameda Turnpike Road Co., 30 Cal. 182.

which it is sent.[20] It must appear that the person served and the appellant, if the service is made by him,[1] or the attorney for the appellant if the service is made by the attorney,[2] reside or have their offices in different places. When service is made by a third person, the attorney of the appellant who has signed the notice, and not the agent, must be regarded as the person making the service.[3] And an affidavit of a third person is insufficient which shows that the affiant resided in a different place from the person served but which contains nothing to show where the appellant or his attorney resides.[4] If respondent has two attorneys, one of whom resides or has his office where the person making the service is, and the other resides in a different place, service by mail may be made on the latter, especially when the circumstances are such as to raise a doubt in the mind of the appellant as to the position of the former in the case.[5]

How service is made.—When service is made by mail, the notice must be deposited in the postoffice in a sealed envelope addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid.[6] It is not necessary that the notice be deposited in the postoffice at the place where the attorney for the appellant resides, or has his office, as there is nothing in the language of this or any other statute indicating an intention on the part of the legislature to require the party making the service to deposit the paper in any particular one of the postoffices of the state having regular

20. Code Civ. Proc., § 1012; Linforth v. White, 129 Cal. 188, 61 Pac. 910; Luck v. Luck, 83 Cal. 574, 23 Pac. 1035; Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398; People v. Alameda Turnpike Road Co., 30 Cal. 182.

1. Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398.

2. Luck v. Luck, 83 Cal. 574, 23 Pac. 1035.

3. Moore v. Besse, 35 Cal. 183.

4. Linforth v. White, 129 Cal. 188, 61 Pac. 910, followed in Townsend v. Parker, 21 Cal. App. 317, 131 Pac. 766.

5. Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050.

6. Code Civ. Proc., § 1013.

mail connection with the place to which the paper is to be sent.[7] While the envelope containing the notice should be addressed to the attorney of the adverse party at his office or place of residence, the appellant may, in opposition to a motion to dismiss the appeal, show by other proof that the notice was properly served, even though the transcript be defective in this respect. The service by mail does not contemplate a delivery as a part of the service, as is evident by the provision of section 1013, that "the service is complete at the time of the deposit" in the postoffice.[8] And since, as has been already said in regard to personal service, the party making service may employ any agency in making delivery, even the postoffice department,[9] the appellant may show that the notice, though misdirected, had been forwarded to the respondent and had been received by him. Such proof establishes personal service upon the respondent, and confers jurisdiction on the appellate court. The affidavit of the respondent is competent proof of this fact.[10]

Proof of Service.

§ 133. In General.—Proof of service of notice of appeal must be made.[11] While the code does not provide how this proof shall be made, it has been held that the certificate of the sheriff, the admission of the respondent's attorney, or the affidavit of a third person making the service is competent as proof of the fact.[12]

7. Luck v. Luck, 83 Cal. 574, 23 Pac. 1035, overruling Murdock v. Clarke, 73 Cal. 25, 14 Pac. 385; Reed v. Allison, 61 Cal. 461. See, also, Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232, and Steele v. Merced Co., 62 Cal. 6, following Reed v. Allison, 61 Cal. 461. See People v. Alameda Turnpike R. Co., 30 Cal. 182, quaere.

8. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8. See, also, Brown v. Green, 65 Cal. 221, 3 Pac. 811, as to when service is complete.

9. See supra, § 130.

10. Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8.

11. Ellis v. Bennet, 2 Cal. Unrep. 302, 3 Pac. 801.

12. Moore v. Besse, 35 Cal. 183.

The usual method of making proof of service is by the admission of the respondent's attorney.[13] Such admission should be signed by the attorney served.[14] An attorney representing several parties may limit his admission of service to some of the parties, and where he does so, such admission cannot constitute service upon the remainder.[15] The fact that proof of service is not attached to the notice of appeal is of no consequence.[16]

Where proof is lost.—If the original proof of service be lost, a copy may be filed and used instead of the original, and the substituted paper is entitled to the same weight as would be the original.[17]

§ 134. Sufficiency of Proof.—An affidavit of service of notice of appeal should strictly and properly be made by the person who had himself made the service. At all events, it should show that the affiant had personal knowledge of the facts.[18] The affidavit must state positively the fact of service.[19] If service is not personal, the affidavit must show the existence of the facts authorizing service in this manner, and a strict compliance with all the requirements of the law to effect service,[20] or at least a full substantial compliance therewith.[1] If service is made by leaving a copy in the office of the attorney,

13. Moore v. Besse, 35 Cal. 183; Western Pacific R. R. Co. v. Reed, 1 Cal. Unrep. 327.

14. Brown v. Green, 65 Cal. 221, 3 Pac. 811. (It is doubtful if the appellate court can supply the name of the attorney when the admission is not subscribed).

15. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603, based on the principle of Estate of Pendergast, 143 Cal. 135, 76 Pac. 962.

16. Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552.

17. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580.

18. Selfridge v. Paxton, 135 Cal. 281, 67 Pac. 138.

19. Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398 (an affidavit which recites that the affiant "alleges and believes" that he served a copy of the notice of appeal is insufficient).

20. Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341; Linforth v. White, 129 Cal. 188, 61 Pac. 910. See supra, §§ 130, 131, 132.

1. Selfridge v. Paxton, 135 Cal. 281, 67 Pac. 138.

the affidavit must show that there was no person in the office at the time.[2] And it is not sufficient in this respect merely to state that there was no one "in the front room" of the office.[3] The affidavit must show also that the office was open,[4] that the notice was left in a conspicuous place in the office, and that it was left there between the hours of 9 in the morning and 5 in the afternoon.[5]

Service by mail.—If service by mail is made, the affidavit must show that the person to be served and that the person making the service, if service is made by the appellant,[6] or that the attorney for the appellant, if service is made by him or a third person,[7] reside or have their offices in different places. The place of residence must be shown, as no presumption with respect thereto arises from the mere circumstance that the action is tried in a particular place.[8] Where the affidavit is made subsequent to the date of mailing, the place of residence as of the day the notice was deposited in the postoffice should be shown.[9] The affidavit must also show that

2. Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341; Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910.

3. Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910.

4. Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341 (a statement that the affiant "left a copy at the office" is consistent with the fact that the office was closed and that the copy was left outside of the door).

5. Doll v. Smith, 32 Cal. 475 (a statement that the affiant left "a copy of the same at the office" is consistent with the idea that the copy was put "in the stove or some other place where it was not likely to be found").

6. Selfridge v. Paxton, 135 Cal. 281, 67 Pac. 138; Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398 (where service was made by the appellant); People v. Alameda Turnpike R. Co., 30 Cal. 182; Koyer v. Benedict, 4 Cal. App. 48, 87 Pac. 231.

7. Linforth v. White, 129 Cal. 188, 61 Pac. 910 (where the affidavit of a third person showed his place of residence, but not that of the appellant's attorney, it is insufficient). See, also, Cunningham v. Warnekey, 61 Cal. 507 (where the residence of the affiant or the appellant's attorney was not stated); Moore v. Besse, 35 Cal. 183 (where the affidavit did not show where the affiant or the appellant's attorney resided).

8. Moore v. Besse, 35 Cal. 183.

9. Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109 (an affidavit of

there is a regular communication by mail between the places of residence or office of the person making the service and the person served,[10] as the appellate court cannot judicially know or intend that there is such communication.[11]

§ 135. Authenticating Proof to Appellate Court.—While there is no provision in the statute or rules of the supreme court prescribing the mode in which service of the notice of appeal shall be authenticated, the better practice is to have the proof of such service made a part of the record in the court from which the appeal is taken, in order that there may be evidence in that court that the judgment has been removed therefrom.[12] The jurisdiction of the court to hear an appeal depends upon the fact that notice has been properly served, not upon the proof of that fact being contained in the transcript.[13] Where notice to dismiss is made upon the ground that the transcript fails to show service of a notice of appeal, the appellant may, upon the hearing of the motion to dismiss, move for leave to supply proof of such service.[14] Upon leave being granted, he may file in the appellate court either original proof of such service or a certificate of the clerk below

mailing was made two days after the service of the notice, which avers that the attorneys making the service and the attorneys served "reside" at places specified, between which there "is" a regular communication by mail, fails to show their place of residence at the time of service, and is insufficient).

10. Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398; Reed v. Allison, 61 Cal. 461; Steele v. Merced Co., 62 Cal. 6; People v. Alameda Turnpike R. Co., 30 Cal. 182.

11. People v. Alameda Turnpike R. Co., 30 Cal. 182.

12. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986.

13. See cases cited infra, as to showing of proof of service in record.

14. Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757 (evidence of service may be shown by other modes than by being incorporated in the transcript); Estate of Stratton, 112 Cal. 513, 44 Pac. 1028; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Moore v. Besse, 35 Cal. 183; Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050.

that such proof has been made and filed in that court.[15] This proof may be made before the hearing of the motion when there is sufficient time after the defect is discovered.[16] So, also, if the affidavit of proof be defective, objection to the service of notice of appeal may be obviated by the filing of a new affidavit showing due service of the original notice of appeal, free from objection, and an admission of service by the respondent.[17] The appellate court should be liberal in allowing such proof to be made when it can cause the respondent no injustice, and which will secure to the appellant a hearing on the merits. Especially will this course be allowed where the defect is one arising out of a careless use of language and the objection is technical.[18] If, however, such proof is not made and the transcript contains no proof of service, the appeal will be dismissed.[19] But it will not be dismissed for failure of the transcript to contain proof of service of the notice, if the appellant is able to show that service has in fact been properly made.[20]

III. SECURITY.

Necessity for and Waiver.

§ 136. Under the Old Method.—With reference to the security on appeals taken by the regular method, section 940 of the Code of Civil Procedure provides:

"The appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal, an undertaking be filed or a deposit of money be made with

15. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013; Moore v. Besse, 35 Cal. 183; Hildreth v. Gwindon, 10 Cal. 490.

16. Moore v. Besse, 35 Cal. 183.

17. Marten v. De Ornelas, 139 Cal. 41, 72 Pac. 440; Schloesser v. Owen, 134 Cal. 546, 66 Pac. 726.

18. Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109.

19. Moore v. Besse, 35 Cal. 183; Ellis v. Bennett, 2 Cal. Unrep. 302, 3 Pac. 801.

20. Knowlton v. MacKenzie, 110 Cal. 183, 42 Pac. 580, explaining Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109.

the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."

This provision has not been changed since the year 1874. It is mandatory. If the required security is not given, the statute declares that the appeal is ineffectual for any purpose.[1] The appellate court is without jurisdiction[2] and the appeal will be dismissed,[3] unless the appeal is sufficient under the alternative method in which no undertaking is required.[4]

Where several appeals are taken.—Where several appeals are taken in one action, there must be an undertaking on appeal in the sum of three hundred dollars, or a deposit of that amount in connection with each appeal, and this whether the notice of appeal is given by separate notices or in one instrument.[5] But where an appeal is taken from several nonappealable orders (reviewable upon an appeal from the judgment), and from the judgment, the appeal is in legal effect only an appeal from the judg-

1. Kaltschmidt v. Weber, 139 Cal. 76, 72 Pac. 632; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815; Lowell v. Lowell, 55 Cal. 316; Suisun Lumber Co. v. Fairfield School Dist., 19 Cal. App. 587, 127 Pac. 349, on rehearing.

2. Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657.

3. Title Ins. & T. Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723; Estate of Wells, 148 Cal. 659, 84 Pac. 37; Hibernia Savings & Loan Soc. v. Freese, 127 Cal. 70, 59 Pac. 769; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94; Forni v. Yoell, 99 Cal. 173, 33 Pac. 887; Scott v. Glenn, 98 Cal. 168, 32 Pac. 983; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; Wakeman v. Coleman, 28 Cal. 58; Franklin v. Reiner, 8 Cal. 340; Bryan v. Berry, 8 Cal. 130; Stewart v. Burbridge, 7 Cal. Unrep. 356, 101 Pac. 419; Iverson v. Jones, 2 Cal. Unrep. 437, 5 Pac. 626; Ellis v. Bennett, 2 Cal. Unrep. 302, 3 Pac. 801; Suisun Lumber Co. v. Fairfield School Dist., 19 Cal. App. 587, 127 Pac. 349; Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35.

4. See supra, § 105, and infra, § 138.

5. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747; Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Estate of Kasson, 135 Cal. 1, 66 Pac. 871; Gardner v. California Guarantee Inv. Co., 129 Cal. 528, 62 Pac. 110; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Centerville & Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

ment, and a single undertaking for three hundred dollars which refers intelligibly to the judgment is sufficient.[6]

A single exception to the rule requiring an undertaking on each of several appeals was recognized when an order denying a new trial was directly appealable. An appeal from this order and from a judgment were so far regarded as a single appeal that a single undertaking for three hundred dollars was deemed sufficient to uphold both appeals. The only reason given for this exception was that the practice had continued too long to warrant disturbing it.[7]

§ 137. Waiver.—An undertaking on appeal or deposit may be waived by the respondent.[8] In this connection the Code of Civil Procedure provides:

"The undertaking may be waived by the adverse party in writing."[9]

"In all cases, the undertaking or deposit may be waived by the written consent of the respondent."[10]

Under these provisions the waiver of an undertaking on appeal must be in writing, and it must be express. Moreover, the stipulation must be signed with the object

6. Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244 (holding, therefore, that a cost bond in the sum of three hundred dollars is sufficient); Commercial Bank of Santa Ana v. Wells, 5 Cal. App. 473, 90 Pac. 981; McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912. See infra, § 148.

7. Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029; White v. Stevenson, 139 Cal. 531, 73 Pac. 421; Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440; Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Estate of Kasson, 135 Cal. 1, 66 Pac. 871; Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187; Chester v. Bakersfield Town Hall Assn., 64 Cal. 42, 27 Pac. 1104.

8. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; Colburn v. Parrett, 25 Cal. App. 749, 145 Pac. 540.

9. Code Civ. Proc., § 940 (in part).

10. Code Civ. Proc., § 948 (in part).

and intent to effect such waiver. Where there is no allusion in the stipulation to the undertaking and nothing to indicate an intention to waive it, an undertaking is not waived by a stipulation extending the time of the appellant for the filing of his brief,[11] or by a stipulation to have the cause placed on the calendar out of its regular order.[12] But where there is a stipulation attached to the transcript to the effect that an undertaking in due form has been properly filed, it will be supposed either that a good and sufficient undertaking was filed, or that the filing was waived.[13] However, it is a rule that such certificate is not conclusive upon the appellate court.[14]

The waiver of an undertaking must be made within the time for filing it. If attempted to be made subsequently, after the appeal has lapsed, there is no cause pending in the appellate court in which to make a stipulation.[15] It is not necessary, however, that the waiver be filed within that time, if it is required to be filed at all.[16]

§ 138. Under Alternative Method.—Under the alternative method of taking appeals, the appellant is not required to furnish an undertaking.[17] In other words,

11. Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180. Compare Gardner v. California Guarantee Investment Co., 129 Cal. 528, 62 Pac. 110, holding respondent to be estopped from objecting to a fatal defect in the undertaking.

12. Little v. Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

13. Forni v. Yoell, 99 Cal. 173, 33 Pac. 887.

14. Estate of Marshall, 118 Cal. 379, 50 Pac. 540; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411. See Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147, approving Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411.

15. Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411; Newman v. Maldonado, 3 Cal. Unrep. 540, 30 Pac. 833.

16. Newman v. Maldonado, 3 Cal. Unrep. 540, 30 Pac. 833.

17. Chung Sing v. Southern Pacific Co., 178 Cal. 261, 172 Pac. 1103; Estate of Stough, 173 Cal. 638, 161 Pac. 1; Title Ins. & T. Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac.

under the new method, the mere filing of the notice of appeal in a proper manner operates, ipso facto, to perfect the appeal, and a failure to serve the notice or give a cost bond, or an error in attempting to do so, which might have been fatal to the appeal under the old method, may be treated as a matter of no legal consequence.[18] It is only for the purpose of obtaining a stay of proceedings that the appellant must file an undertaking.[19] Even though an appellant may have attempted to follow the old method, an appeal will not be dismissed for want of undertaking, if the steps taken to perfect the appeal comply with all the requirements of the new method.[20] The fact that a bill of exceptions was prepared in place of a reporter's transcript has no bearing on this question. If an appeal is properly taken in compliance with either the old or new method, the record may be made up in any way permitted by the code.[1]

Who must Give Security.

§ 139. In General.—The general policy of the law is to require security of all appellants for the purpose of pro-

100; Bohn v. Bohn, 159 Cal. 366, 116 Pac. 567; Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Mitchell v. California & O. S. S. Co., 154 Cal. 731, 99 Pac. 202; Estate of McPhee, 154 Cal. 385, 97 Pac. 878 (it is a matter solely for the legislature to determine whether it will require a bond to be given); Baker v. Slocum (Cal. App.), 192 Pac. 551; Nezik v. Cole (Cal. App.), 184 Pac. 523; Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 179 Pac. 447; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Suisun Lumber Co. v. Fairfield School Dist., 19 Cal. App. 587, 127 Pac. 349; Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35; Colusa Milling Co. v. Draper Dray & Storage Co., 13 Cal. App. 329, 109 Pac. 504; Russell v. Banks, 11 Cal. App. 450, 105 Pac. 261.

18. Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686, per Hart, J.

19. Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 179 Pac. 447.

20. Title Ins. & T. Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723; Blair v. Brownstone Oil & Ref. Co., 21 Cal. App. 676, 132 Pac. 605; Russell v. Banks, 11 Cal. App. 450, 105 Pac. 261.

1. Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435. See infra, § 234.

tecting respondents. In view of this policy, the rule is well settled that statutory exemptions will not be extended by implication beyond the cases specified in the statute.[2] The fact that a person not exempt from giving an undertaking on appeal joins in the appeal of one so exempt does not relieve the former from the necessity of filing a proper undertaking. If he fails to give the requisite undertaking, his appeal will be dismissed, but it does not follow that the appeal of the other party will share a like fate. By joining in giving notice of appeal the purposes of the notice are fully accomplished, and the situation is no different from that which would be presented had the exempt party prosecuted his separate appeal and duly served the other with notice thereof.[3]

Where there are several appellants.—The code does not require a separate undertaking on the part of each appellant. The provision is that the undertaking must be executed "on the part of the appellant," and as the code provides that the singular number includes the plural, it follows that several persons joining in one appeal may support such appeal by one undertaking in the prescribed sum of three hundred dollars. Moreover, there is the same reason for holding that the appellants may unite in the undertaking as in the notice of appeal.[4] The fact that the respective appellants do not assert the same interests, or that some may not be aggrieved, does not necessitate their giving separate undertakings. The fact that the sum fixed may not be sufficient security to protect the respondent is immaterial.[5]

2. Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180.

3. Meyer v. City of San Diego, 130 Cal. 60, 62 Pac. 211.

4. Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027; Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415, citing Code Civ. Proc., § 17.

5. Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027.

§ 140. On Appeal from Probate Orders.—The code provides as follows:

"When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking."[6]

The covenants of the bond of an executor or administrator do not make it, on its face, an undertaking on appeal; and it becomes such, under certain circumstances, only by virtue of the provision of section 965 just quoted.[7] This provision has reference only to appeals from orders made in proceedings for the settlement of the estate of which the appellant is the executor or administrator,[8] and in which the estate is interested. It does not, for example, exempt an executor or administrator from giving security on an appeal from an order revoking his letters, as such appeal involves personal matters, and is not a matter in which the estate is interested.[9] Furthermore, this section applies only to one who at the time of the appeal "is" an administrator, executor or guardian. One who was such executor, administrator or guardian, but who resigned before taking an appeal, is not within the scope of the statute.[10] Unlike section 946 of the Code of

6. Code Civ. Proc., § 965; Ex parte Orford, 102 Cal. 656, 36 Pac. 928. See Matter of Sharp, 92 Cal. 577, 28 Pac. 783, decided under a similar provision in the insolvency act with reference to the assignee. See section 67 of Insolvent Act of 1880 and section 71 of the act of 1895. See Estate of Corwin, 61 Cal. 160, decided under Code Civ. Proc., § 970, which was similar to section 965.

7. Estate of McDermott, 127 Cal. 450, 59 Pac. 783.

8. Ex parte Orford, 102 Cal. 656, 36 Pac. 928; Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650; Estate of Skerrett, 80 Cal. 62, 22 Pac. 85.

9. Estate of Danielson, 88 Cal. 480, 26 Pac. 505. See infra, § 141.

10. Estate of McDermott, 127 Cal. 450, 59 Pac. 783.

Civil Procedure, no order dispensing with security is necessary under this section.[11]

§ 141. Persons Acting in Another's Right.—Section 946 of the Code of Civil Procedure provides:

"The court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right."

This provision, though contained in a code section relating to stay of execution pending appeal, seems to be applicable to the three hundred dollar undertaking on appeal, and has been so applied in several cases.[12] However, it is distinct from section 965 of the code just discussed. This one applies to cases in which the executor, administrator or guardian is party plaintiff or defendant in an action,[13] while section 965 applies to appeals from judgments and orders made in probate proceedings.[14]

While the order under this section rests entirely in the discretion of the court, and is never a matter of course,[15] it is necessary, to authorize such an order, that the appellant act in another's right. Such an order, for example, cannot be made on an appeal from an order revoking letters of administration, as the appellant in such case is acting in his own right.[16] It is not indispensably necessary, however, that the judgment should be rendered against the appellant in his official capacity. It is sufficient if it is made to appear to the court that the matter in litigation really involves the rights of the estate, and that if the judgment is unreversed, the prop-

11. Ex parte Orford, 102 Cal. 656, 36 Pac. 928. See infra, § 141.

12. Estate of Skerrett, 80 Cal. 62, 22 Pac. 85 (where Beatty, C. J., concedes "without deciding, that section 946 applies to the three hundred dollar bond," but notes that Mr. Hayne thinks it does not. 2 New Trial and Appeal, § 220).

13. Ex parte Orford, 102 Cal. 656, 36 Pac. 928.

14. See supra, § 140.

15. Estate of Skerrett, 80 Cal. 62, 22 Pac. 85.

16. Estate of Danielson, 88 Cal. 480, 26 Pac. 505.

erty rights of such estate will be affected and its assets diminished. Thus, where in an action to recover money the defendant executor claims the right to retain it as funds of the estate, and judgment is rendered against him personally, the executor in appealing from such judgment is in reality acting for the estate and security may be dispensed with, as such appeal is a continued assertion by him of the right of the estate to the fund in controversy.[17] Under this provision the court may also dispense with security of a municipal officer sued in his official capacity.[18]

When order must be made.—The order dispensing with security under section 946 of the Code of Civil Procedure must be made within the time allowed for filing the undertaking on appeal. After the appeal has lapsed, it cannot be restored by an order subsequently made, and a direction that such order be entered nunc pro tunc is unavailing.[19]

Entry of order.—The action of the court does not depend upon the entry of the order dispensing with security in its minutes, but is effectual when made by the court and filed with the clerk.[20]

§ 142. States, Counties, Cities, Towns and Their Officers.—Section 1058 of the Code of Civil Procedure provides:

17. Kirsch v. Derby, 93 Cal. 573, 29 Pac. 218 (it makes no difference that no answer has been filed by the executor and judgment is rendered against him by default, where the complaint in effect charges that he collected the money sued for in his representative capacity and claims the right as executor to retain it and not otherwise).

18. Scheerer v. Edgar, 67 Cal. 377, 7 Pac. 760 (where a county auditor appealed from a judgment in mandamus proceedings against him in his official capacity).

19. Estate of Skerrett, 80 Cal. 62, 22 Pac. 85, followed in Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411. See infra, § 154, as to time to file undertaking.

20. Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

"In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this code, the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code."[1]

While this section of the code specifically exempts the state from giving an undertaking on appeal when it is a party plaintiff,[2] it does not do so in terms when it is a party defendant. But it has been held that notwithstanding this omission, no undertaking is required of the state when made a defendant, as the intention to dispense with the bond on the part of the state in all cases is clear. The reason for the omission is undoubtedly due to the fact that the state could not be brought in as a defendant at the time of the last amendment to this section.[3]

County officers.—It will be observed that section 1058, just quoted, makes special mention of the state and state officers, and while it mentions counties, cities and towns, it omits the mention of any officers of such counties, cities and towns. Under a similar provision in the Practice Act, the supreme court held the statute applicable to the board of supervisors where the county was the real

1. Meyer v. City of San Diego, 130 Cal. 60, 62 Pac. 211 (applying statute to a city).

Under the Practice Act, a county was not required to give an undertaking on appeal; Warden v. Mendocino County, 32 Cal. 655; People v. Marin County Supervisors of Marin County, 10 Cal. 344.

2. See People v. Clingan, 5 Cal. 389 (not referring to any statute, but holding a state cannot be denied a hearing in her own courts because no cost bond has been filed; besides, a fund has been provided for such cases, so that the respondent has ample indemnity).

3. San Francisco Law & C. Co. v. State, 141 Cal. 354, 74 Pac. 1047.

party in interest.[4] This rule of construction has been applied to this section of the code, and it may now be regarded as settled that no undertaking on appeal is required of an officer of a county, city, or town, when such officer represents his county, city, or town.[5]

§ 143. School Districts and Boards of Education.—School districts are not specifically exempted by section 1058 of the Code of Civil Procedure from the necessity of giving undertakings upon appeal, and as a city is a corporation distinct from that of the school district, even though both are designated by the same name and embrace the same territory, it is held that school districts are not embraced in the exemption of cities. And as the school district is not exempt, the reasoning, by which it is held that county and city officers are exempt though not mentioned in the statute, is inapplicable, and does not extend to officers of school districts so as to exempt them from the necessity of giving an undertaking upon appeal.[6] A board of education may, however, procure an order of the court pursuant to section 946 of the Code of Civil Procedure dispensing with the undertaking.[7]

Form and Sufficiency.

§ 144. In General.—As to the form and sufficiency of the security on appeal, section 941 of the Code of Civil Procedure provides:

"The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least

4. People v. Marin County Supervisors, 10 Cal. 344.

5. Lamberson v. Jefferds, 116 Cal. 492, 48 Pac. 485 (holding a county auditor to be exempt, and that undertaking was necessary, though there was no order under Code Civ. Proc., § 946, dispensing with security). Contra, Von Schmidt v. Widber, 3 Cal. Unrep. 835, 32 Pac. 532.

6. Mitchell v. Board of Education, 137 Cal. 372, 70 Pac. 180.

7. See Stoutenborough v. Board of Education, 104 Cal. 664, 38 Pac. 449 (where an order dispensing with security was made).

two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal."

The appellant is given an election to perfect his appeal by giving the undertaking prescribed, or by depositing three hundred dollars in the court below. If he elects to make the deposit, he cannot afterward withdraw the money and substitute an undertaking.[8]

The jurisdiction of the appellate court does not depend upon the sufficiency of the undertaking originally filed. The undertaking is jurisdictional only because it is made so by statute.[9] And as section 954 of the code authorizes the filing of an undertaking in the appellate court if the original undertaking filed is insufficient,[10] the court has jurisdiction though the original undertaking is insufficient,[11] provided the insufficiency is not such that there is in effect no undertaking at all.[12] The respondent however, is in all cases entitled to such an undertaking as is prescribed in section 941, and if the appellant, after notice of a motion to dismiss his appeal for want of such undertaking, fails to present a sufficient undertaking before the hearing of the motion, his appeal will be dismissed, even though the defect be merely insufficiency.[13] An undertaking on appeal is not required to state the place of residence and occupation of the sureties.[14] Nor is it rendered ineffective by a mistaken indorsement of the title of the cause.[15]

8. Wiebold v. Rauer, 95 Cal. 418, 30 Pac. 558; Mullen v. Hunt, 67 Cal. 69, 7 Pac. 121.

9. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022.

10. See infra, § 161.

11. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022.

12. See infra, § 162.

13. Jarman v. Rea, 129 Cal. 157, 61 Pac. 790.

14. Dobbins v. Dollarhide, 15 Cal. 374.

15. Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

Construction.—An appeal bond will be so construed as to carry out the obvious intention of the parties. To effectuate this intention and support the condition of the bond, the court may transpose or reject insensible words.[16]

§ 145. Identification of Appeal Generally.—The recitals in an undertaking must identify the appeal which it is intended to support;[17] otherwise it will be deemed to be ambiguous and insufficient.[18] The recital, in substance, is usually as follows:

"Whereas the [plaintiff] A. B. in the above-entitled action has appealed to the [supreme court] from a judgment made and entered against the [plaintiff] in said action in the superior court, in favor of defendant in said action, on the —— day of ——, ——, for —— dollars."

If the undertaking otherwise sufficiently refers to the order from which the appeal is taken, it is not rendered insufficient by a recital that the party "is about to appeal" instead of reciting that he "has appealed" therefrom.[19] But it has been held that an undertaking executed after the filing of a first notice of appeal and prior to the filing of a second notice which recites that the appellant has appealed refers only to the first appeal, and will not support the second appeal.[20]

§ 146. Designation of Court to Which Appeal is Taken. While the code does not require that the undertaking on appeal should mention the court to which the appeal is

16. Swain v. Graves, 8 Cal. 549 (where a printed form of bond was used and the word "plaintiff" was by mistake inserted instead of "defendant" or "appellant").

17. Little v. Thatcher, 151 Cal. 558, 91 Pac. 321; Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418 (holding an undertaking properly entitled in the cause and stating the date of rendition and entry of the judgment sufficiently describes the judgment); Brownell v. Superior Court, 32 Cal. App. 227, 162 Pac. 419. See infra, § 147.

18. Kaltschmidt v. Weber, 139 Cal. 76, 72 Pac. 632; Hibernia Sav. & Loan Society v. Freese, 127 Cal. 70, 59 Pac. 769.

19. Kaltschmidt v. Weber, 139 Cal. 76, 72 Pac. 632, following Forrest v. Havens, 38 N. Y. 469.

20. Hibernia Sav. & Loan Society v. Freese, 127 Cal. 70, 59 Pac. 769.

taken, and it is probable that an undertaking would be sufficient which states an intention to appeal from a judgment (describing it) without mentioning the court, the practice is to name the court, and there are strong reasons why the court should be mentioned. However this may be, if the court is named, the undertaking must conform to the notice of appeal in this respect, as the sureties cannot be held on such an obligation if the appeal is taken to a different court from that designated. The provision of the constitution requiring the transfer to the proper court of an appeal taken to the wrong court has no application to this question, as that provision applies only when the appeal to a specified appellate court complies with the law relating to appeals to that court in respect of the undertaking precisely as though no other court was in existence.[1]

§ 147. Description of Judgment or Order.—In identifying the appeal to which it relates, the undertaking should recite or allude to the judgment or order appealed from.[2] In this respect the undertaking must, of course, conform to the notice of appeal and recite the same judgment or order mentioned therein.[3] If the appeal is from an order on a motion for a new trial, the undertaking is defective if it recites an appeal from the motion for new trial instead of from the order on such motion;[4] though such defect may be curable under section 954 of the Code of Civil Procedure.[5] But a mistake as to the date of the order or judgment appealed from does not invalidate an under-

1. McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912. Distinguished in Pacific Paving Co. v. Verso, 11 Cal. App. 383, 105 Pac. 136. No request to cure that defect by filing a sufficient undertaking was made in this case, but subsequently it was held that the defect was a mere insufficiency and remediable.

2. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

3. Bennett v. Bennett, 42 Cal. 629; Stockton School Dist. v. Goodell, 6 Cal. Unrep. 277, 56 Pac. 885.

4. Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029.

5. See infra, § 162.

taking if there is but one order or judgment and one appeal, and the order or judgment is in all other respects correctly described.[6] And where the undertaking is properly entitled in the cause and correctly states the date of rendition and entry of the judgment, the specification of one item or incident of the judgment cannot invalidate what is otherwise sufficient.[7]

§ 148. Where Several Appeals are Taken.—When several appeals are taken in an action, the several undertakings may be included in the same instrument. Indeed, this has been the common practice in this state from an early period.[8] The undertaking in such cases must refer to each appeal and show upon its face that it is given in consideration of all of them,[9] and, of course, it must be in an amount sufficient to embrace each appeal.[10] An undertaking reciting one appeal cannot be made applicable to another. It will be construed to refer only to the appeal recited, and the other will be dismissed as without an undertaking.[11]

A single undertaking for three hundred dollars reciting each of several appeals and conditioned that the ap-

6. Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511.

7. Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418 (where the judgment directed a reconveyance of land upon the payment of eleven thousand dollars, less costs of suit, and the undertaking recited an appeal rendered and entered on a designated date "in said superior court in favor of the plaintiffs for $1,193.15 costs of suit").

8. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

9. Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796.

10. See supra, § 136.

11. Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94; Pignaz v. Burnett, 121 Cal. 292, 53 Pac. 633; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; Field v. Andrada (Cal.), 37 Pac. 180; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Biagi v. Howes, 63 Cal. 384; McRae v. Argonaut Land & Dev. Co., 6 Cal. Unrep. 145, 54 Pac. 743; Rhoades v. Gray, 5 Cal. Unrep. 664, 48 Pac. 971.

pellant will pay all damages awarded "on the appeal" or "on said appeal" or "such appeal" is ambiguous, and will not support any of the appeals, because it cannot be ascertained therefrom for which appeal it was given.[12] The same is true when an undertaking for three hundred dollars is conditioned generally upon "said appeals."[13] Such undertakings are not merely insufficient, but are invalid, for any purpose, and the objection cannot be obviated by the filing of a new undertaking under section 954 of the code,[14] though the circumstances may be such as to estop the respondent from raising the objection.[15] This rule is not varied by the fact that one or more orders included in the appeal are not appealable, as the court on the motion to dismiss for want of undertaking cannot look into the record either for the purpose of determining whether the order appealed from is appealable or whether the appeal is without merit.[16] This case, however, is distinguishable from that in which an appeal is taken from a judgment and several nonappealable orders and a single undertaking is given which refers intelligibly to the judgment.[17] On the other hand, when upon

12. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747; Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027; Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418; Carter v. Butte Creek Gold Min. & P. Co., 131 Cal. 350, 63 Pac. 667 ("in consideration of . . . such appeal"); Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Home and Loan Association v. Wilkins, 71 Cal. 626, 12 Pac. 799; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815 ("such appeal"); People v. Center, 61 Cal. 191, explained in Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187 ("such appeal").

13. McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16, cited in Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813.

14. See infra, § 162.

15. Gardner v. California Guarantee Investment Co., 129 Cal. 528, 62 Pac. 110 (where the respondent before the expiration of the time to appeal and while the defect can be cured enters into stipulations extending the time to file a brief without objecting to the defect in the undertaking until it is too late to take another appeal, he is estopped from raising the objection).

16. Estate of Kasson, 135 Cal. 1, 66 Pac. 871; Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813.

17. See supra, § 136.

an appeal from a judgment and an order the undertaking recites both appeals and specifies a joint and several obligation in the sum of six hundred dollars, for the two appeals or either of them, the undertaking, if not sufficient in form, affords sufficient basis to permit the filing of a new undertaking in the appellate court.[18] And when all the appeals save one have become ineffectual for failure to file an undertaking in time, the undertaking filed will be referred to the appeal in existence, and the presumption that the surety intended to make a valid contract will remove any latent ambiguity that might otherwise have been raised by the fact of there having been two appeals taken.[19]

On appeal from a judgment and an order denying a new trial.—The effect of the rule that one undertaking in the sum of three hundred dollars is sufficient to confer jurisdiction of an appeal both from a judgment and from an order denying a new trial is that both appeals are practically one only for the purposes of the undertaking.[20] It is essential, of course, that the single undertaking so given shall refer to each of the appeals and show on its face that it is given in consideration of both.[1] But where it recites both appeals and shows that it was given in consideration of both, the undertaking to pay all damages and costs which may be awarded "on the appeal," fairly construed, holds the sureties for any and all costs and damages that may be awarded on either of the two appeals in consideration of which it is given, and it is sufficient.[2] Such an undertaking is sufficient also which is

18. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022.

19. Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027.

20. Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029. See supra, § 136.

1. Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244 (undertaking held sufficient); Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510.

2. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747; Bell v. Staacke, 159 Cal. 193, 115 Pac. 221; Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604. Contra, Commer-

conditioned to pay all damages and costs which may be awarded "on the appeals," though the words "or either of them" are omitted after the word "appeals." The promise includes all damages and costs that may accrue on either of the appeals.[3]

Effect of insufficiency as to one appeal.—Though several undertakings are included in one instrument, they are distinct from each other. The validity of each appeal is to be determined by the undertaking given in support of it, and the insufficiency of the undertaking as to one appeal does not affect the others. Thus a material alteration of the undertaking as to one appeal does not invalidate the other appeals.[4]

§ 149. Names of Parties.—The undertaking on appeal must be executed "on the part of the appellant."[5] Where several parties join in an appeal, the undertaking should be on the part of all and each of them. On an appeal by several parties, an undertaking which is merely on the part of "the appellant" and promises that "said appellant" will pay all costs is insufficient. Such an undertaking can support only the appeal of a single appellant, and as there is no way of determining which is meant, all of the attempted appeals must fall.[6] If such undertaking, however, should designate one of the appellants, it would be sufficient as to the party designated. It does not follow that because losing parties

cial Bank of Santa Ana v. Wells, 5 Cal. App. 473, 90 Pac. 981.

3. Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440.

4. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176 (where an undertaking reciting an appeal from a judgment and order denying a new trial was executed before the making of the latter order, and subsequent to its execution the date of the order was inserted in the undertaking, the appeal from the order denying a new trial will be dismissed, but the appeal from the judgment will be entertained). Where it cannot be ascertained to which of several appeals the undertaking refers, all will fall. See supra, this section.

5. Code Civ. Proc., § 941.

6. Title Ins. & Trust Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723.

shall jointly give notice of their intention to appeal and thereafter one or more shall decline to proceed further, that the appeal of the other parties desirous of prosecuting the matter to a hearing must for this reason be lost.[7] A converse of this proposition is that in which an appeal is taken by one party and the undertaking thereon purports on its face to be given on an appeal taken by several appellants. Such an undertaking is insufficient to support the appeal, as the sureties standing on the letter of their contract are liable only for damages or costs awarded against the appellants and there is no just appeal.[8]

The code does not require the undertaking to contain the name of the payee, and an omission of a payee is therefore immaterial.[9] Nor is it necessary that the sureties be named in the body of the undertaking to make it obligatory. The only use of such recital is to show who executed the paper, and the signatures sufficiently show this fact.[10]

§ 150. **Effect of Condition.**—An undertaking on appeal must be to the effect that the appellant "will pay all damages or costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars."[11] An undertaking is insufficient if it does not contain the words "or on a dismissal thereof," as required by the statute.[12] The omission of this stipulation cannot be supplied by a corresponding stipulation in an undertaking to stay execution.[13] But

7. Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685.

8. Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685; Fry v. Astorg, 29 Cal. App. 740, 156 Pac. 873.

9. Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

10. Dore v. Covey, 13 Cal. 502.

11. Code Civ. Proc., § 941.

12. Jarman v. Rea, 129 Cal. 157, 61 Pac. 790; Estate of Fay, 126 Cal. 457, 58 Pac. 936; Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147. See Cohen v. Connick, 26 Cal. App. 491, 147 Pac. 479 (this provision is not applicable to appeals from the justices' courts).

13. See infra, § 151, as to curing defect by stipulation in stay bond.

the omission does not defeat or impair the undertaking in case there should be an affirmance of the judgment, and it follows that the omission amounts to an "insufficiency" only, and the undertaking is curable under section 954 of the Code of Civil Procedure.[14] On an appeal by several parties, a blank in the clause, "which may be awarded against . . . on appeal," renders the undertaking fatally uncertain where the undertaking is executed on the part of the "appellant" only.[15]

§ 151. Stay Bond as Appeal Bond.—The undertaking on appeal and the undertaking to stay execution may be in one instrument or several, at the option of the appellant.[16] Although combined in one document, the undertakings must, however, be considered as separate and independent instruments.[17] It so happens that the statute requires the provisions of the undertaking on appeal, with other terms, to be inserted in the undertaking for a stay of execution, yet the former is required for one purpose and the latter for another, and an undertaking filed for the purpose of staying execution cannot take the place of an undertaking on appeal.[18] Upon the same reasoning, omissions in an undertaking on appeal cannot be supplied or cured by the insertion of such stipulations in an undertaking to stay execution, even though both are contained in the same document and the sureties on each are the same.[19] Thus, an omission of a stipulation for the

14. See infra, § 162.

15. Title Ins. & Trust Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723.

16. Code Civ. Proc., § 947; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187. See infra, § 187 et seq.

17. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815; Edwards v. Superior Court, 159 Cal. 710, 115 Pac. 649 (distinguishing these cases and holding that a different rule is applicable to appeals from the justices' courts). See Zoller v. McDonald, 23 Cal. 136, an appeal from the justice's court in which an undertaking insufficient to stay execution was held sufficient as an undertaking on appeal.

18. Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323.

19. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147; Duffy v.

payment of costs and damages "in the event of a dismissal of an appeal" cannot be cured by such a stipulation in an undertaking to stay execution.[20] So, also, in a case in which several appeals are taken, uncertainties in the undertaking on appeal as to which appeal the undertaking refers cannot be cured by recitals in the stay undertaking.[1]

Execution, Delivery and Filing.

§ 152. Execution Generally.—An undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. Moreover, the statute provides that the undertaking shall be executed on the part of the appellant; not by him, but by the sureties.[2] Of course the sureties must sign it,[3] and when an undertaking is signed in behalf of a foreign surety company by certain of its officers and has affixed thereto the seal of the corporation, it cannot be held void because not properly signed where there is nothing before the court to show that the officers signing it were not authorized to do so.[4]

When executed.—An undertaking on appeal executed before the rendition or making of the judgment or order to be appealed from is without consideration and will not support an appeal,[5] and the subsequent interlineation of the date of the judgment or order is such an alteration as avoids the undertaking and discharges the sureties. The respondent is entitled to an undertaking sufficient both in fact and in form, and he is not to be

Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323.

20. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

1. Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815.

2. Tissot v. Darling, 9 Cal. 278; Curtis v. Richards, 9 Cal. 33.

3. See infra, § 157, as to who may be sureties.

4. Gutzeil v. Pennie, 95 Cal. 598, 30 Pac. 836.

5. Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935; Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176.

subjected to the necessity of showing that the sureties are liable by reason merely of an estoppel in pais.[6] An undertaking on appeal may, however, be signed after the entry of the judgment or order and before the taking of an appeal therefrom, and the subsequent appeal is a sufficient consideration to make it a valid and effective obligation whenever it should be filed. The statute does not require that the undertaking shall not be signed by the sureties until after the appeal is taken, or limit any time between the two acts. It merely requires that it shall be filed within five days after the service of the notice of appeal.[7]

§ 153. **Delivery and Filing Generally.**—The undertaking on appeal is not required by the statute to be delivered to the obligee when executed, but to be filed in the clerk's office for the use and benefit of the adverse party.[8] The acceptance by the clerk constitutes, in effect, the delivery.[9] An undertaking has no effect until it is filed, but upon being filed, it becomes an executed and valid obligation upon the sureties.[10]

When undertaking is deemed filed.—When section 940 of the Code of Civil Procedure speaks of filing the undertaking with the clerk, it means that the undertaking is to be presented to him for filing at his office. Delivering an instrument to the clerk or his deputy at a place other than the office where it is required to be filed is not sufficient, even though the officer indorse it as "filed." It is the duty of the litigant, wherever he may find the officer, to see to it that within the time contemplated by law the paper shall have been deposited in the office. If, however, the appellant procures the officer to accompany him to the

6. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176.

7. Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935; Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176. See infra, § 154, as to time of filing.

8. Holmes v. Ohm, 23 Cal. 268.

9. Howard Ins. Co. v. Silverberg, 89 Fed. 168.

10. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176.

clerk's office after office hours and there presents the undertaking for filing, the fraction of the day will be disregarded, and the undertaking will be deemed to have been filed on that day.[11]

§ 154. Time of Filing.—The Practice Act required the undertaking on appeal to be filed or the deposit made "within five days after the notice of appeal is [was] filed."[12] While section 940 of the Code of Civil Procedure, as originally enacted, required the undertaking to be filed the same time as the notice of appeal, by an amendment in 1874, this section was changed to the form it bears to-day. This section now provides:

"The appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing."[13]

These provisions are mandatory, and a compliance therewith is necessary to perfect an appeal,[14] and to confer jurisdiction on the appellate court.[15] The undertak-

11. Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223.

12. Aram v. Shallenberger, 42 Cal. 275 (an undertaking filed before "service" of notice is inoperative); Elliott v. Chapman, 15 Cal. 383; Hastings v. Halleck, 10 Cal. 31.

13. Estate of Stough, 173 Cal. 638, 161 Pac. 1; Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027; Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998; Estate of Skerrett, 80 Cal. 62, 22 Pac. 85; Stratton v. Graham, 68 Cal. 168, 8 Pac. 710 (a deposit of money in lieu of an undertaking on appeal must be made within the time in which an undertaking is required to be filed); Biagi v. Howes, 63 Cal. 384; Boyd v. Burrel, 60 Cal. 280; Reed v. Kimball, 52 Cal. 325; Cummins v. Scott, 23 Cal. 526 (an appeal will not be dismissed on the ground that the bond was not filed in time, where the original bond was filed in time, but a new bond is filed when the sureties justify); Gordon v. Wansey, 19 Cal. 82; Shaw v. Randall, 15 Cal. 384; Elliott v. Chapman, 15 Cal. 383. See supra, § 153, as to what constitutes filing.

14. Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; Boyd v. Burrel, 60 Cal. 280; Shaw v. Randall, 15 Cal. 384; Elliott v. Chapman, 15 Cal. 383.

15. Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Continental Building & L. Assn. v. Beaver, 6 Cal. App. 116, 91 Pac. 666.

ing may be filed at any time within the five days after the service of notice of appeal,[16] but it cannot be filed after the expiration of such time. If not filed within such time, the appeal, in the language of the code, is ineffectual for any purpose,[17] and will be dismissed,[18] unless the time has been extended.[19] Indeed, if more than five days after the service of the notice elapse before the filing of the notice, the undertaking is too late if filed on the day the notice is filed. It has been contended that the filing of the notice with the clerk and its service on the adverse party are parts of a continuous act which as a whole constitutes the service of the notice, and that the undertaking is in time if filed within five days after filing, but this contention is not maintainable, as this code provision clearly distinguishes between the acts of "service" and "filing," and treats them as separate acts.[20] If the fifth day falls on Sunday or a holiday, the appellant has until the following day to file his undertaking.[1]

Where service is by mail.—Since service by mail is complete at the time of the deposit of the notice in the postoffice, the undertaking must be filed within five days after the deposit. That provision of the code which extends the time one day for each twenty-five miles distance between the place of deposit and place of address when

16. Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98.

17. Brown v. Green, 65 Cal. 221, 3 Pac. 811; Hewes v. Carville Mfg. Co., 62 Cal. 516; Rauer's Law & Collection Co. v. Standley, 3 Cal. App. 44, 84 Pac. 214; Buhman v. Nickels & Brown Bros., 1 Cal. App. 266, 82 Pac. 85.

18. Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594; Pacific Mutual L. Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260; Aram v. Shallenberger, 42 Cal. 275; Continental Bldg. & Loan Assn. v. Beaver, 6 Cal. App. 116, 91 Pac. 667.

19. See infra, § 156, as to order extending time, and to the point that such order must be obtained, if at all, before expiration of the statutory five days in such cases.

20. Boyd v. Burrel, 60 Cal. 280.

1. Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998; Jenness v. Bowen, 77 Cal. 310, 19 Pac. 522; Rauer's Law & Collection Co. v. Standley, 3 Cal. App. 44, 84 Pac. 214.

a right is to be exercised or an act done by the adverse party within a given number of days after service, has no application to the filing of an undertaking on appeal, as the act of filing is not to be done by the adverse party but by the appellant himself.[2]

§ 155. Before Notice of Appeal and After Lapse of Time to Appeal.—Under the Practice Act it was held the filing of a notice of appeal must precede the filing of the undertaking, because until an appeal is taken there is nothing to give effect to the undertaking.[3] Under the code, as the time in which to file the undertaking runs from the service of the notice of appeal, it follows that the undertaking cannot be effectual for any purpose if filed before service has been made.[4] It may, however, be filed before the notice is filed. Since the service of the notice of appeal may precede the filing in point of time,[5] and since the undertaking must be filed within five days after "service,"[6] it follows that the undertaking may be filed before the filing of the notice of appeal.[7]

After expiration of time to appeal.—Though an appeal is ineffectual for any purpose until the undertaking is filed, the filing of such undertaking is not one of the required steps to the taking of an appeal. It follows that if notice of appeal is filed and served within the time limited, the undertaking may be filed afterward if filed within five days after service of the notice of appeal.[8]

2. Brown v. Green, 65 Cal. 221, 3 Pac. 811.

3. Dooling v. Moore, 19 Cal. 81; Buckholder v. Byers, 10 Cal. 481; Iverson v. Jones, 2 Cal. Unrep. 437, 5 Pac. 626.

4. Little v. Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128; Carpentier v. Williamson, 24 Cal. 609 (dismissing appeal). See Coonan v. Loewenthal, 122 Cal. 72, 54 Pac. 388, refusing to dismiss because of conflict in the affidavits as to time of filing and service.

5. See supra, § 129.

6. See supra, this section.

7. Hewes v. Carville Mfg. Co., 62 Cal. 516.

8. Kaltschmidt v. Weber, 139 Cal. 76, 72 Pac. 632; Lowell v. Lowell,

§ 156. Extension of Time.—Section 1054 of the Code of Civil Procedure authorizes the extension of time in which to file an undertaking on appeal, and therefore this section controls section 940 of the same code.[9] The section, so far as it is pertinent, provides:

"When an act to be done, as provided in this code, relates to . . . the undertakings to be filed, . . . the time allowed by this code, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party."

Prior to 1905, the time in which to except to the sufficiency of the sureties, ran from the "filing of the undertaking." Under this state of the law, it was the respondent's duty to watch the files in the clerk's office for the five days prescribed by statute should he wish to object to the sufficiency. But as he was not required to do so thereafter unless the time in which to file an undertaking was extended by a proper order of court, it was held that any order extending time would convey no notice to him unless presented for filing at the office of the clerk before the expiration of the time for filing the undertaking.[10] In 1905, the statute changed the

55 Cal. 316 (explaining Holcomb v. Sawyer, 51 Cal. 417. In that case a rehearing was granted and the question was decided as indicated in the text, but the original opinion holding to the contrary was reported by mistake); Linn v. Peirsol, 37 Cal. App. 171, 173 Pac. 763.

9. Schloesser v. Owen, 134 Cal. 546, 66 Pac. 726; Wadsworth v. Wadsworth, 74 Cal. 104, 15 Pac. 447.

Prior to 1861 the corresponding section of the Practice Act did not authorize such extension of time. Elliott v. Chapman, 15 Cal. 383. But see Bradley v. Hall, 1 Cal. 199, in which the appellate court held that it had power to enlarge the time to justify bail on appeal.

10. Rauer's Law & Collection Agency v. Standley, 3 Cal. App. 44, 84 Pac. 214 (holding that an undertaking filed after the expiration of the five days is ineffectual, though there is attached to it an order extending the time).

point from which the time to except to the sureties begins, from "the filing" to the "notice of filing" of the undertaking.[11] It has been held that if a notice of appeal is served upon the attorney of a party, a subsequent service upon him in person is a mere nullity, and cannot operate to extend the time to file an undertaking.[12]

Sureties and Justification.

§ 157. In General.—The general statute concerning appeals requires that the undertaking on appeal be executed by at least two sureties.[13] Section 1056 of the Code of Civil Procedure authorizes the acceptance as sole surety, on undertakings on appeal, of surety companies, both domestic[14] and foreign,[15] that have sufficient paid-up capital and have complied with all the requirements of the statute regulating the formation and admission of such corporations to transact business in the state. Section 616 of the Political Code, forbidding the insurance commissioner from issuing to foreign insurance companies a certificate that the corporation is authorized to transact business in the state until the corporation has first filed in his office the name of an agent and his place of residence in this state on whom summons and other process may be served, is by section 1056 of the Code of Civil Procedure made applicable to corporations executing undertakings on appeal. When a surety company has complied with this statute and filed such designation with the insurance commissioner, it may act as surety, although it may not have filed such designation with the Secretary of State, as required by the act relating to foreign corporations. The certificate of the

11. Code Civ. Proc., § 948.

12. Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594.

13. Code Civ. Proc., § 941; Cramer v. Tittle, 2 Cal. Unrep. 715, 11 Pac. 852 (in department), 72 Cal. 12, 12 Pac. 869 (in Bank).

14. Cramer v. Tittle, 72 Cal. 12, 12 Pac. 869, holding act of March 12, 1885, to be constitutional.

15. Gutziel v. Pennie, 95 Cal. 598, 30 Pac. 836.

insurance commissioner is prima facie proof, however, of the compliance of the corporation with the provisions of section 616 of the Political Code.[16]

§ 158. Justification.—The justification of sureties has its origin in the fear of the exceptant that the surety may not be financially able to respond upon a breach of the obligation, and its object is to afford the respondent an opportunity to test, by personal examination, the responsibility of the sureties. The justification itself is the proof by the surety of his adequate pecuniary ability. Under California practice this showing is in the first instance required to be made before the presentation of the undertaking by the affidavit of the sureties, that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking over and above all their just debts, exclusive of property exempt from execution.[17] This affidavit establishes a prima facie justification which suffices in case no exception is taken, but it may be overcome at the instance of, and upon an examination by the exceptant.[18]

Waiver and estoppel.—The justification is a right accorded to the adverse party which he may either waive expressly or be debarred from asserting under the well-settled rules of estoppel. Thus, there is a waiver where the justice refused to swear the sureties in justification saying that both he and the exceptant knew them to be good, and the exceptant assented thereto, saying that he only served the notice because directed to do so by his attorney.[19] So, also, a nonappearance on the part of the exceptant is a waiver of the exception.[20]

16. Gutziel v. Pennie, 95 Cal. 598, 30 Pac. 836.

17. Code Civ. Proc., § 1057. And see cases cited infra.

18. Bank of Escondido v. Superior Court, 106 Cal. 43, 39 Pac. 211.

19. Blair v. Hamilton, 32 Cal. 49.

20. Bank of Escondido v. Superior Court, 106 Cal. 43, 39 Pac. 211.

§ 159. Proceedings on Justification and Time Therefor.—A respondent who wishes to object to the sufficiency of the sureties on the undertaking on appeal is required to serve a notice of exception upon the appellant, within thirty days after notice of the filing of the undertaking.[1] The time therefor runs, as just stated, from the notice of the filing of the undertaking, not from service of the notice of appeal,[2] or from the expiration of the five days after service in which an undertaking is required to be filed.[3] Within twenty days after service of notice of such exception, the sureties or other sureties are required to justify "upon five days' notice to the respondent of the time and place of justification."[4] If a justification is attempted without this notice, it is of no avail.[5] The appellant in his notice of justification should designate an hour at which he will be present with his sureties. If he gives notice of justification on a particular day between the hours of 10 A. M. and 5 P. M., the clerk may properly refuse to take the justification of the sureties before the last hour mentioned in the notice, the opposite party being absent, as the appellant by failing to designate the hour might compel the attendance of the opposite party the entire day in waiting for his appearance.[6]

Before whom.—The sureties, when excepted to, must justify "before a judge of the court below"; that is to say, before a judge of the county where the suit is pending. A justification before a judge of another county is insufficient.[7]

1. Code Civ. Proc., § 948, as amended in 1905. See Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; Brown v. Green, 65 Cal. 221, 3 Pac. 811 (decided prior to 1905, when the time ran from the filing of the undertaking).

2. Brown v. Green, 65 Cal. 221, 3 Pac. 811.

3. Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223.

4. Code Civ. Proc., § 948.

5. Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200; Stark v. Barrett, 15 Cal. 361.

6. Lower v. Knox, 10 Cal. 480.

7. Tevis v. O'Connell, 21 Cal. 512; Roush v. Van Hagen, 18 Cal. 668 (dismissing appeal).

§ 160. Effect of Failure to Justify.—While the Practice Act specifically provided that upon a failure of the sureties on an undertaking on appeal to justify within the time limited, the appeal shall be regarded as if no undertaking had been given,[8] the code contains no effectual provision for the justification of sureties on an undertaking on appeal. It is true that the sureties may be required to justify under section 948 of the Code of Civil Procedure.[9] But the only consequence of a failure to justify is that the execution is no longer stayed. It is so provided in the code.[10] As it has not provided that the appeal itself shall fail or be dismissed for the mere lack of the prescribed justification, it follows that the appeal is effectual, although the sureties may be found worthless.[11]

Amendment of or Filing New Undertaking.

§ 161. In General.—The code provides that:

"No appeal can be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking, approved by a justice of the supreme court be filed in the supreme court, or (where the appeal is pending before a district court of appeal either by direct appeal thereto or by transfer thereto by the supreme court) if a good and sufficient undertaking, approved by a justice of said district court of appeal, be filed in said district court, before the hearing upon motion to dismiss the appeal.[12]

8. Roush v. Van Hagen, 17 Cal. 121 (holding the time to justify could not be extended by the court); Lower v. Knox, 10 Cal. 480; People ex rel. Scott v. Fannon, 1 Cal. Unrep. 158.

9. See supra, § 158.

10. Code Civ. Proc., § 948.

11. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147; Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160 (therefore a stipulation extending the time for justification is not a waiver of an objection to a failure to file the transcript in time); Schacht v. Odell, 52 Cal. 447; Lang v. Specht, 2 Cal. Unrep. 111; Gooby v. Hanson (Cal.), 11 Pac. 489; Meysan v. Chabrie (Cal.), 5 Pac. 670.

12. Code Civ. Proc., § 954 (in part); Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

This statute is remedial in nature and should be given a liberal interpretation with a view to further the determination of appeals upon their merits.[13] It seems, though, that it refers only to appeals to the supreme court or district courts of appeal; not to appeals from justices' courts.[14]

When sureties become insufficient.—There is no statute authorizing an appellate court to entertain an application for an order requiring the appellant to file a new appeal bond when the sureties become insufficient, and such an application must be denied.[15] That portion of section 954 of the Code of Civil Procedure authorizing a trial court in such case to order a new bond with sufficient sureties evidently relates to the stay bond, as it provides that on failure to give such bond execution may issue.[16]

§ 162. Limitations on and Application of Rule.—Section 954 of the Code of Civil Procedure authorizes the giving of a new undertaking only when the undertaking filed is "insufficient." It does not authorize the filing of an undertaking in the appellate court in the first instance. The filing of a new undertaking pursuant to this code

13. Pacific Paving Co. v. Verso, 11 Cal. App. 383, 105 Pac. 136.

14. Brownell v. Superior Court, 32 Cal. App. 227, 162 Pac. 419 ("Our attention has not been directed to any provision [of the code] which would make it applicable to appeals from justices' courts"); Cohen v. Connick, 26 Cal. App. 491, 147 Pac. 479. ("It is true that section 954 specifically refers to appeals to the supreme court and to a district court of appeal, but the supreme court, in considering appeals from the justice court, has approved the same practice as that expressly authorized by said statute. And in the decision of the question whether a new undertaking may be filed in the superior court, the same distinction has been made between a void undertaking, or one that 'is in reality no undertaking at all,' and one that is merely 'defective' in not fully complying with the requirements of the statute.") See JUSTICES OF THE PEACE.

15. Macomber v. Conradt, 4 Cal. Unrep. 723, 37 Pac. 382.

16. Mersfelder v. Spring, 136 Cal. 619, 69 Pac. 251 (where Beatty, C. J., says that the language of the amendment to the section indicates that its author had failed to appreciate the difference between an appeal bond and a stay bond).

section is in the nature of an amendment to a defective proceeding. If no undertaking has been filed, there is nothing to amend.[17] And where two or more appeals are taken and the undertaking filed refers to one only, there is no undertaking on the appeals not referred to, and relief cannot be had under this section.[18]

Again, an undertaking may be filed which is so defective as not to constitute any obligation upon the sureties therein, and which is in reality no undertaking at all. In such a case there is more than a mere insufficiency. There is an entire want of indemnity to the respondent, and section 954 has no application and affords no remedy.[19] The mere use of the phrase "insufficiency of undertaking" indicates a distinction between an undertaking which does not fully comply with the terms of section 941 and an entire absence of undertaking.[20] To allow a new undertaking to be filed under such circumstances would in effect permit an appeal to be perfected after the time fixed by law.[1] And any undertaking purporting to have been filed in such case is without effect.[2]

It is difficult, if not impossible, to lay down a test as to what degree of insufficiency will be tantamount to no bond within the rule. It has been held in a number of

17. Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; and see other cases cited in note 1, infra, this section.

18. Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510. Compare Bornheimer v. Baldwin, 38 Cal. 671, in which the court in dismissing the appeal said that no offer to file an undertaking was made, and thereby seemed to recognize the right to file an undertaking in such case.

19. Jarman v. Rea, 129 Cal. 157, 61 Pac. 790; Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; Home and Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; Brownell v. Superior Court, 32 Cal. App. 227, 162 Pac. 419.

20. Jarman v. Rea, 129 Cal. 157, 61 Pac. 790.

1. Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Home and Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799.

2. Little v. Thatcher, 151 Cal. 558, 91 Pac. 321; Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657.

cases that if the undertaking fails to identify the judgment it is intended to support, the error is incurable.[3] Thus, where several appeals are taken and one undertaking of three hundred dollars is given which does not show to which appeal it applies, the undertaking cannot be considered as applying to either, and is in effect no undertaking at all.[4] It has been held, however, that the doctrine of these cases should not be stretched to cover cases not fairly within them.[5] An undertaking is void and in effect no undertaking at all which is executed before the rendition of the judgment appealed from,[6] or which is filed more than five days after service of notice of appeal.[7] Where the only undertaking on file purports to have been given pursuant to the sections of the code relating to undertakings to stay execution, there is no undertaking at all.[8] So, also, an undertaking on appeal from an order on new trial is fatally defective which recites an appeal from the judgment and erroneously states it was rendered on the date of the order appealed from.[9]

On the other hand, the undertaking may be defective in the form in which it is framed, and yet sufficiently indicative of an intent to comply with the terms of the statute as to be binding upon the sureties, or it may be defective in that it indemnifies the respondent against a portion only of the costs and damages that may be

3. Little v. Thatcher, 151 Cal. 558, 91 Pac. 321.

4. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747 (where the undertaking was conditioned "on the appeal"); Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418; Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543; Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16 (where several appeals were taken and the undertaking for three hundred dollars was conditioned generally upon "said appeals," the undertaking is void); Home and Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; Commercial Bank v. Wells, 5 Cal. App. 473, 90 Pac. 981.

5. Pacific Paving Co. v. Verso, 11 Cal. App. 383, 105 Pac. 136.

6. Stackpole v. Hermann, 126 Cal. 465, 58 Pac. 935.

7. Aram v. Shallenberger, 42 Cal. 275.

8. Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74.

9. Little v. Thatcher, 151 Cal. 558, 91 Pac. 321.

awarded him. There is in such cases a mere insufficiency which may be remedied.[10] And it has been held that an undertaking on two appeals properly recited in the undertaking in which the penal sum was six hundred dollars in gross, instead of three hundred dollars for each appeal, is remediable under section 954.[11] So, also, it has been held that the following defects constitute an insufficiency merely and are remediable: A misrecital as to the court to which the appeal is taken;[12] an omission of the clause "or on a dismissal thereof";[13] an informal execution by a surety;[14] and a defect in the affidavit of the sureties in omitting to state that they are residents or householders or freeholders as required by the code.[15] A mistake in the title of the action, if material, is curable where the undertaking names the court and department thereof, gives the number of the cause and accurately describes the judgment.[16]

§ 163. Proceedings and Time Therefor.—The undertaking to be filed pursuant to section 954 of the Code of Civil Procedure must have indorsed thereon the approval of the justice of the court in which the appeal is pending.[17] And it has been held that the approval by a justice of the appellate court of an undertaking substituted for one held insufficient, amounts to a determination that the undertaking is such in form and substance as the statute requires, and also that the sureties are sufficient. The Practice Act did not authorize the respondent to ex-

10. Jarman v. Rea, 129 Cal. 157, 61 Pac. 790.

11. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022.

12. Pacific Paving Co. v. Verso, 11 Cal. App. 383, 105 Pac. 136, where the appeal was taken to the district court of appeal and the undertaking recited that the appeal was to be taken to the supreme court.

13. Jarman v. Rea, 129 Cal. 157, 61 Pac. 790.

14. Bay City etc. Assn. v. Broad, 128 Cal. 670, 61 Pac. 368.

15. Schacht v. Odell, 52 Cal. 447.

16. Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780.

17. Wood v. Pendola, 77 Cal. 82, 19 Pac. 183.

cept to the sureties on such an undertaking, and an exception was held entirely ineffectual.[18]

Time of filing undertaking.—Section 954 of the Code of Civil Procedure is a limitation upon the discretion of the appellate court to allow the filing of new undertakings,[19] and the court cannot allow the filing of a new undertaking on or after the hearing of a motion to dismiss upon this ground. The party must avail himself of the privilege granted him by the statute before the hearing of a motion, as he cannot contest the motion, and then claim the privilege, if the motion is decided against him. An application made at that time comes too late.[20]

IV. TIME TO APPEAL.

Introductory.

§ 164. Statutory Provisions.—Formerly, the code distinguished between the several appealable judgments and orders in respect to the time in which an appeal might be taken.[1] But in 1915 a uniform rule applicable to all

18. Stevenson v. Steinberg, 32 Cal. 373.

19. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

20. Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685; Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147; Wood v. Pendola, 77 Cal. 82, 19 Pac. 183; McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912. Compare Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780 (where a request was made "at the hearing" and granted).

1. Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562 (appeal from judgment); McDonald v. McDonald, 168 Cal. 433, 143 Pac. 726 (harmonizing code sections as to appeals from interlocutory decrees of divorce); Moyer v. De Witt, 166 Cal. 780, 135 Pac. 1126 (appeal from judgment); Brode v. Goslin, 158 Cal. 699, 112 Pac. 280 (under alternative method); Dundas v. Lankershim School Dist., 155 Cal. 692, 102 Pac. 925 (appeal from judgment); Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324 (judgment); Smith v. Superior Court, 147 Cal. 336, 82 Pac. 79 (interlocutory decree of divorce); Dore v. Klumpke, 140 Cal. 356, 73 Pac. 1064 (interlocutory decree in partition); Bartlett v. Mackey, 130 Cal. 181, 62 Pac. 482 (interlocutory judgment in partition suit); Begbie v. Begbie, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667 (judgment in divorce suit); Byrne v. Hoag, 126 Cal. 283,

appeals was adopted. Section 939 of the Code of Civil Procedure as amended in that year provides:

"An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other code, or under any other statute, within sixty days from the entry of said judgment or order. No appeal, however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry. If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."[2]

58 Pac. 688 (appeal from order of sale of mortgaged premises made after judgment of foreclosure); Doyle v. Republic Life Ins. Co., 125 Cal. 15, 57 Pac. 667 (order after final judgment); Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; In re Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192 (order denying probate); Estate of Calkins, 112 Cal. 296, 44 Pac. 577 (order denying probate of will); Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95 (order dissolving attachment); Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770 (special order after judgment); Illinois Trust & Sav. Bank v. Pacific Ry. Co., 99 Cal. 407, 33 Pac. 1132; Sutton v. Symons, 97 Cal. 475, 32 Pac. 588 (order after judgment); Barham v. Hostetter, 67 Cal. 272, 7 Pac. 689 (order dissolving judgment); California Southern R. R. Co. v. Southern Pacific R. R. Co., 67 Cal. 59, 7 Pac. 123 (special order after judgment); Thompson v. Connolly, 43 Cal. 636 (order denying a new trial); Fairchild v. Daten, 38 Cal. 286 (order refusing to vacate award of arbitration); Smith v. Christian, 47 Cal. 18 (appeal from judgment); Waggenheim v. Hook, 35 Cal. 216 (appeal from judgment); Peck v. Courtis, 31 Cal. 207 (order denying motion for new trial); Hihn v. Peck, 30 Cal. 280 (order denying new trial); Peck v. Vandenberg, 30 Cal. 11 (order denying new trial); Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402, 35 Pac. 310; Donovan v. Kemper, 26 Cal. App. 352, 146 Pac. 1044; Chase v. Holmes, 19 Cal. App. 670, 127 Pac. 652 (appeal from judgment); Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975 (order denying new trial); Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931 (judgment); Bekins v. Dieterle, 5 Cal. App. 586, 91 Pac. 105 (appeal from a portion of a judgment dissolving a temporary injunction held not an appeal from an order under the statute); Walbridge v. Cousins, 2 Cal. App. 302, 83 Pac. 462 (order denying new trial); Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661 (appeal from judgment).

2. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019; Huntington Park Improvement Co. v. Park Land Co.,

Alternative method.—Section 941b, relating to appeals by the new and alternative method, originally allowed the filing of the notice of appeal within sixty days after notice of entry of the judgment or order appealed from, or at the latest within six months after entry.[3] In 1915 this act was amended by eliminating the provision relating to notice of appeal, and by shortening the time in which to appeal in all cases to sixty days after entry of judgment. As amended, this code section provides:

165 Cal. 429, 132 Pac. 760; Young v. New Pedrara Onyx Co., 30 Cal. App. Dec. 828 (judgment of nonsuit). See infra, § 224, as to time to appeal if the appellant desires to preserve the lien of an attachment.

Before 1907, the section of the code limiting the time in which to appeal from the judgment provided that an exception to the decision or verdict on the ground that it is not supported by the evidence could not be reviewed on an appeal from the judgment unless the appeal was taken within sixty days after the rendition of the judgment. This act was amended in 1907 by substituting the word "entry" for the word "rendition." As thus amended, it continued to exist until 1915, when it was repealed. This provision did not have the effect of changing the time within which to appeal from the judgment, but was merely a limitation upon the matters that might be considered on the appeal. Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; McHugh v. Adkins, 117 Cal. 228, 49 Pac. 2.

3. The following cases were decided under this code section as originally enacted: North American Dredging Co. v. Outer Harbor Dock & Wharf Co., 178 Cal. 406, 173 Pac. 756 (premature notice held ineffectual for any purpose); McDonald v. McDonald, 168 Cal. 433, 143 Pac. 726; Title Ins. & T. Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723; Huntington Park Improvement Co. v. Park Land Co., 165 Cal. 429, 132 Pac. 760; Fraser v. Sheldon, 164 Cal. 165, 128 Pac. 33 (as to presumption of service of notice); Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294 (as to proof of giving of notice in support of motion to dismiss); Estate of Dunphy, 158 Cal. 1, 109 Pac. 627 (holding that this provision did not extend the time to appeal in probate proceedings); Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Blake & Bilger & Co. v. Chappell (Cal. App.), 186 Pac. 823; French v. Macnider, 28 Cal. App. 67, 151 Pac. 371 (notice must be in writing); Hartfield v. Alderate, 25 Cal. App. 732, 145 Pac. 146; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Suisun Lumber Co. v. Fairchild School Dist., 19 Cal. App. 587, 127 Pac. 349 (on rehearing); Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460, 120 Pac. 44; Brown v. Coffee, 17 Cal. App. 381, 121 Pac. 309, 311; Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340.

"This notice [of appeal] may be filed at any time after the rendition of the judgment, order or decree, but the same must be filed within sixty days after entry of said judgment, order or decree. If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

Orders and judgments in probate.—The time for an appeal from orders and judgments in probate proceedings is prescribed in section 1715 of the Code of Civil Procedure, which provides:

"The appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than sixty days after the same is entered in the minute-book of the court, etc."[4]

Section 1664, relating to proceedings in the nature of an action to determine heirship, requires that all appeals therein must be taken within sixty days from the date of the entry of the judgment or order complained of.[5]

§ 165. Necessity of Compliance With Statute.—One intending to take an appeal must comply with the provisions of the code prescribing the time for the exercise of the right, as such statutes are jurisdictional and mandatory. If an appeal is not taken within the time limited by

4. Estate of Seiler, 174 Cal. 498, 164 Pac. 401 (appeal from order admitting will to probate); In re Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340 (appeal from order refusing probate of will); Estate of Campbell, 141 Cal. 72, 74 Pac. 550; Estate of Leonis, 138 Cal. 194, 71 Pac. 171; Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 Pac. 198 (citing the code section); Ex parte Miller, 109 Cal. 643, 42 Pac. 428; Estate of Backus, 95 Cal. 671, 30 Pac. 796 (order refusing probate of will); In re Wiard, 83 Cal. 619, 24 Pac. 45; In re Fisher, 75 Cal. 223, 17 Pac. 640 (decree of partial distribution); Estate of Burns, 54 Cal. 223 (order setting apart homestead). See infra, § 173.

5. Estate of Westerfield, 96 Cal. 113, 30 Pac. 1104; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; In re Grider, 81 Cal. 571, 22 Pac. 908.

statute, the appellate court is without jurisdiction to entertain it.[6] It is the uniform practice on motion of the parties to dismiss tardy appeals.[7] However, since an

6. Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486; Sessions v. Southern Pacific Co., 159 Cal. 599, 114 Pac. 982; Land v. Johnston, 156 Cal. 253, 104 Pac. 449; Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Sequeira v. Collins, 153 Cal. 426, 95 Pac. 876; Roney v. Reynolds, 152 Cal. 323, 92 Pac. 847; County Bank v. Jack, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705; Estate of Campbell, 141 Cal. 72, 74 Pac. 550; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Estate of Keithley, 134 Cal. 9, 66 Pac. 5; McGorray v. Stockton Sav. & L. Soc., 131 Cal. 321, 63 Pac. 479; Bartlett v. Mackey, 130 Cal. 181, 62 Pac. 482; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264; Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Begbie v. Begbie, 128 Cal. 154, 49 L. R. A. 141, 60 Pac. 667; Swafford v. Board of Education, 127 Cal. 484, 59 Pac. 900; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; In re Fisher, 75 Cal. 523, 17 Pac. 640; Bornheimer v. Baldwin, 42 Cal. 27; Fairchild v. Daten, 38 Cal. 286; Wetherbee v. Dunn, 36 Cal. 249; Peck v. Courtis, 31 Cal. 207; Heihn v. Stansbury, 12 Cal. 412; Young v. New Pedrara Onyx Co., 30 Cal. App. Dec. 828; Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39; West v. Mears, 17 Cal. App. 718, 121 Pac. 700; Sheehan v. Lapique, 15 Cal. App. 517, 115 Pac. 965 (refusing to grant rehearing of an order of dismissing an appeal because the record showed the appeal was not taken in time); Houghton Co. v. Kennedy, 8 Cal. App. 777, 97 Pac. 905; Pogue v. Ball, 4 Cal. App. 406, 88 Pac. 376; Larue v. Chase, 1 Cal. Unrep. 613; Harper v. Minor, 1 Cal. Unrep. 225.

7. Whiting Mead Com. Co. v. Bayside Land Co., 178 Cal. 93, 172 Pac. 598; Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486; Sessions v. Southern Pacific Co., 159 Cal. 599, 114 Pac. 982; Allen v. Allen, 159 Cal. 197, 113 Pac. 160; In re Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Hellman v. Longley, 154 Cal. 78, 97 Pac. 17 (appeal from judgment); Matthai v. Kennedy, 148 Cal. 699, 84 Pac. 37; Robinson v. Eberhart, 148 Cal. 495, 83 Pac. 452; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Dore v. Klumpke, 140 Cal. 356, 73 Pac. 1064; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Contra Costa v. Soto, 138 Cal. 57, 70 Pac. 1019; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Hunter v. Melam, 133 Cal. 601, 65 Pac. 1079; McDonald v. Lee, 132 Cal. 252, 64 Pac. 250; Estate of Nelson, 132 Cal. 182, 64 Pac. 294 (appeal from order denying revocation of probate of a will); Wise v. Ballou, 129 Cal. 45, 61 Pac. 574; Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757; Doyle v. Republic Life Ins. Co., 125 Cal. 15, 57 Pac. 667; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; United States v. Crooks, 116 Cal. 43, 47 Pac. 870; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387; Borderre v. Den, 106 Cal. 594, 39 Pac. 946; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Sutton v. Symons,

objection that an appeal was not timely goes to the jurisdiction of the appellate court, it is not waived by a fail-

97 Cal. 475, 32 Pac. 588; Estate of Backus, 95 Cal. 671, 30 Pac. 796 (order refusing probate of will); Cambuston v. United States, 95 U. S. 285, 24 L. Ed. 448, see, also, Rose's U. S. Notes (under a statute requiring appeals to be taken within five years); Kerman v. Hunnewill, 91 Cal. 157, 27 Pac. 587; McLaughlin v. Menotti, 89 Cal. 354, 26 Pac. 880; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206 (appeal taken under Code Civ. Proc., § 1664); Crew v. Diller, 86 Cal. 554, 25 Pac. 66; Hammond v. Wallace, 85 Cal. 522, 24 Pac. 837; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; In re Wiard, 83 Cal. 619, 24 Pac. 45 (appeal from probate decree); Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546; Romine v. Cralle, 80 Cal. 626, 22 Pac. 296; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Gray v. Winder, 77 Cal. 525, 20 Pac. 47; Heilbron v. Centerville etc. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; Gruell v. Spooner, 71 Cal. 493, 12 Pac. 511; Emerson v. Bergin, 71 Cal. 335, 12 Pac. 242; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; In re Fisher, 75 Cal. 223, 17 Pac. 640; Brown v. Green, 65 Cal. 221, 3 Pac. 811; Estate of Burton, 64 Cal. 428, 1 Pac. 702 (appeal from order setting apart homestead); Estate of Harland, 64 Cal. 379, 1 Pac. 159 (appeal from order refusing to set aside homestead); Savings & Loan Soc. v. Horton, 63 Cal. 310; Wood v. Forbes, 62 Cal. 37; Voll v. Hollis, 60 Cal. 569; Henshaw v. Palmer, 59 Cal. 314; Preston v. Hearst, 54 Cal. 595; Douglas v. Fulda, 54 Cal. 589; Stoddart v. Burge, 53 Cal. 394 (appeal from order denying motion to vacate order dismissing cross-complaint); Parks v. Barney, 55 Cal. 239; Prescott v. Salthouse, 53 Cal. 221; Holcomb v. Sawyer, 51 Cal. 417; Bates v. Gage, 49 Cal. 126; Smith v. Christian, 47 Cal. 18; Coombs v. Hibberd, 45 Cal. 174; Regan v. McMahon, 43 Cal. 625; McCourtney v. Fortune, 42 Cal. 387; Calderwood v. Peyser, 42 Cal. 110; Bornheimer v. Baldwin, 38 Cal. 671; Wells Fargo & Co. v. Anthony, 35 Cal. 696; Waggenheim v. Hook, 35 Cal. 216; Genella v. Relyea, 32 Cal. 159; Peck v. Courtis, 31 Cal. 207; Towdy v. Ellis, 22 Cal. 650; Lower v. Knox, 10 Cal. 480; Litland v. Eberhart (Cal.), 83 Pac. 455; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304; Fitzgerald v. Fitzgerald, 4 Cal. Unrep. 664, 36 Pac. 947; Raskin v. Robarts, 4 Cal. Unrep. 465, 35 Pac. 763; Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402, 35 Pac. 310; Hooper v. Patterson, 3 Cal. Unrep. 811, 32 Pac. 514; Childs v. Kincaid, 3 Cal. Unrep. 503, 30 Pac. 525; Nichols v. Dunphy, 2 Cal. Unrep. 143; Young v. New Pedrara Onyx Co., 30 Cal. App. Dec. 828 (appeal from judgment of nonsuit); Beaumont v. Midway Provident Oil Co., 21 Cal. App. 128, 131 Pac. 106; Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801; Breidenbach v. M. McCormick Co., 20 Cal. App. 184, 128 Pac. 423; Suisun Lumber Co. v. Fairchild School Dist., 19 Cal. App. 587, 127 Pac. 349 (on rehearing); McDermott v. Catfield, 18 Cal. App. 499,

ure to state it in a motion to dismiss.[8] On the contrary, when it appears that an appeal was taken too late, it is the duty of the appellate court to notice the defect and dismiss the appeal on its own motion.[9] There is, therefore, no force in a contention that an objection that an appeal was taken after the expiration of the statutory period is waived by the action of the respondent in indorsing upon the notice of appeal an admission of service.[10] Such act cannot operate as an estoppel preventing the respondent from raising the objection, as the acts of the parties cannot confer jurisdiction on the court in a case withheld by the law from its jurisdiction.[11] In a case where several appeals are taken, the appellate court without formally dismissing such appeals as are tardy will limit its consideration to those which are timely.[12]

Computation of Time.

§ 166. In General.—It is evident that a party has no right to appeal from a judgment or order before it is ren-

123 Pac. 539; Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681; Sheakley v. Nelson, 13 Cal. App. 379, 109 Pac. 891; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931; Gable v. Page, 6 Cal. App. 67, 91 Pac. 339; Walbridge v. Cousins, 2 Cal. App. 302, 83 Pac. 462; McLean v. Llewellyn Iron Wks., 2 Cal. App. 346, 83 Pac. 1082, 1085; Walbridge v. Cousins, 2 Cal. App. 302, 83 Pac. 462; Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280; Cox v. Odell, 1 Cal. App. 682, 82 Pac. 1086; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661; Prine v. Duncan, 7 Cal. Unrep. 330, 90 Pac. 713. See infra, § 433 et seq. (dismissal).

8. Fairchild v. Daten, 38 Cal. 286 (holding that it is not necessary to raise the objection by motion to dismiss).

9. Estate of Brewer, 156 Cal. 89, 103 Pac. 486; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929 (quoted in Estate of More, 143 Cal. 493, 77 Pac. 407; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Larue v. Chase, 1 Cal. Unrep. 613.

10. Estate of Brewer, 156 Cal. 89, 103 Pac. 486.

11. Estate of Brewer, 156 Cal. 89, 103 Pac. 486.

12. Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562; Roney v. Reynolds, 152 Cal. 323, 92 Pac. 847; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Brandow v. Witney, 54 Cal. 585 (the appeal must be disregarded); Donovan v. Kemper, 26 Cal. App. 352, 146 Pac. 1044; Chase v. Holmes, 19 Cal. App. 670, 127 Pac. 652; Bennett v. Potter (Cal. App.), 113 Pac. 885.

dered or made. And so it is a rule that such an appeal is premature and should be dismissed.[13] While formerly, the time within which to appeal began to run from the time of the rendition of a judgment,[14] under the present procedure, the time runs from the entry of judgment.[15] The judgment is final for the purposes of an appeal as soon as it is entered,[16] and an appeal may be taken within the statutory period after entry, although more than the statutory period after the judge has announced or rendered the judgment.[17] That the term "entry" in the statute limiting the time in which to appeal is used in contradistinction to the word "rendition" is made clear by the history of the statute. Prior to the code, the Practice Act authorized an appeal to be taken from a judgment within one year after the rendition of the judgment. Under this act, the time for an appeal commenced to run from the "rendition" of a judgment;[18] and the failure of the clerk to enter the judgment in the judgment-book at the time it was rendered could not have the effect of extending the time to appeal.[19] The legislature must be presumed to have been familiar with these

13. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176; Preston v. Hearst, 54 Cal. 595; Miller v. Sharpe, 54 Cal. 590; San Diego Inv. Co. v. Crane, 40 Cal. App. 393, 180 Pac. 837. See supra, § 15.

14. Trenouth v. Farrington, 54 Cal. 273; McCourtney v. Fortune, 42 Cal. 387; Webster v. Cook, 38 Cal. 423 (time runs from rendition of judgment, not from the order sustaining the demurrer to the complaint); Wetherbee v. Dunn, 36 Cal. 249; Genella v. Relyea, 32 Cal. 159; Peck v. Courtis, 31 Cal. 207; Gray v. Palmer, 28 Cal. 416.

15. Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 Pac. 868; Matthai v. Kennedy, 148 Cal. 699, 84 Pac. 37; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726; Heilbron v. Centerville etc. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; McLaughlin v. Doherty, 54 Cal. 519; Young v. New Pedrara Onyx Co., 30 Cal. App. Dec. 828 (order of nonsuit); Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39; Hill v. Superior Court, 15 Cal. App. 307, 114 Pac. 805, distinguishing McLaughlin v. Doherty, 54 Cal. 519.

16. Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39.

17. Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475.

18. Gray v. Palmer, 28 Cal. 416.

19. Peck v. Courtis, 31 Cal. 207; Gray v. Palmer, 28 Cal. 416.

decisions, and therefore, when it adopted the definitions which the courts gave to these two words by substituting one for the other, it must be presumed to have intended that the starting point for computing the time to appeal should be changed from the date of the "rendition" of the judgment or order to the date of "entry" in the book wherein it was required by law to be entered.[20]

Holidays.—If the last day in which to take an appeal falls on a holiday, it is excluded under section 12 of the Code of Civil Procedure, and the appeal may be taken on the following day.[1] Section 10 of the Code of Civil Procedure provides a limited kind of a holiday for Saturdays from 12 o'clock noon until 12 o'clock midnight. But it has been distinctly held that Saturdays are not holidays within the meaning of section 12.[2]

§ 167. Necessity for Entry of Judgment or Order.—The fact that an appeal is taken intermediate the rendition of a judgment and entry is no longer fatal. Section 941b of the Code of Civil Procedure, relating to appeals by the alternative method, adopted in 1907, provides that the notice of appeal may be filed "at any time after the rendition of the judgment, order or decree." This amendment was followed in 1915 by a corresponding amendment of section 939 of the code, providing that no appeal shall be dismissed on the ground that it was taken after the rendition of the judgment or order and before formal entry. Likewise, in 1911, section 1715 of the code was amended so as to authorize the taking of appeals in probate proceedings "at any time after the order, decree or judgment is made or rendered."[3]

20. McLaughlin v. Doherty, 54 Cal. 519.

1. Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486; Estate of Rose, 63 Cal. 346.

2. Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486 (under section 12, Code Civ. Proc., it is not a holiday unless it be such during the whole period of the day).

3. Estate of Stone, 173 Cal. 675, 161 Pac. 258. This amendment was undoubtedly brought about by the decision in Estate of Dunphy,

Prior to the adoption of these amendments appeals were frequently dismissed where they were taken prior to the entry of a judgment or order, though after the rendition thereof, since, under the code provisions as formerly worded, there could be no right to take an appeal until such entry had been made, an appeal taken prior to such time was deemed premature, and conferred no jurisdiction on the appellate court.[4] The defect being jurisdictional, it was held that the respondent could not waive it,[5] or be precluded from urging it as a ground for dismissal by circumstances amounting to an estoppel.[6]

158 Cal. 1, 109 Pac. 627, in the previous year, in which an appeal taken before entry of an order was dismissed as premature.

4. Estate of Dunphy, 158 Cal. 1, 109 Pac. 627 (rule applies to probate proceedings which include proceedings in guardianship); Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; Estate of More, 143 Cal. 493, 77 Pac. 407 (whether the date of entry may be shown by the appellant by affidavits filed in opposition to a motion to dismiss, not determined); Estate of More, 143 Cal. 493, 77 Pac. 407; Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Spencer v. Trout, 133 Cal. 605, 65 Pac. 1083 (cited in Baum v. Roper, 1 Cal. App. 435, 82 Pac. 390); Estate of Devincenzi, 131 Cal. 452, 63 Pac. 723; Estate of Kennedy, 129 Cal. 384, 62 Pac. 64; Estate of Sheid, 122 Cal. 528, 55 Pac. 328; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128; McHugh v. Adkins, 117 Cal. 228, 49 Pac. 2; In re Mackay, 107 Cal. 303, 40 Pac. 558 (refusing to dismiss as order was entered); Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Home for Care of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119; Coon v. Grand Lodge, 76 Cal. 354, 18 Pac. 384; Onderdonk v. San Francisco, 75 Cal. 534, 17 Pac. 678; In re Rose, 72 Cal. 577, 14 Pac. 369; Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475 (dismissing an appeal where the notice was filed and served the day before entry); Schroder v. Schmidt, 71 Cal. 399, 12 Pac. 302; Kimple v. Conway, 69 Cal. 71, 10 Pac. 189; People ex rel. Love v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Thomas v. Anderson, 55 Cal. 43; McLaughlin v. Doherty, 54 Cal. 519; More v. Miller, 6 Cal. Unrep. 110, 54 Pac. 263 (modifying 6 Cal. Unrep. 78, 53 Pac. 1077); Meysan v. Chabrie, 2 Cal. Unrep. 508, 7 Pac. 634; Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975.

5. Spencer v. Trout, 133 Cal. 605, 65 Pac. 1083; Estate of More, 143 Cal. 493, 77 Pac. 407 (a respondent may raise the question of prematurity of an appeal, though he may have granted further time in which to file a brief without notifying the appellant of his intention to move for a dismissal).

6. Estate of Pearsons, 119 Cal. 27, 50 Pac. 929.

Moreover, the court would, of its own motion, dismiss the appeal when the fact appeared that it was prematurely taken.[7]

§ 168. Character and Sufficiency of Entry.—Section 668 of the Code of Civil Procedure, providing for the entry by the clerk of judgments in the judgment-book,[8] includes, by its terms, all final judgments in civil actions,[9] except such as to which special provision is made elsewhere.[10] A judgment is "entered" within the meaning of this code section when it is actually entered in the judgment-book.[11] It is not to be deemed entered when the attorney requests the clerk to enter it,[12] or when it is merely entered in the minutes of the court.[13] Moreover, the act of the clerk in compiling the judgment-roll does not start the statute of limitations running,[14] for the code expressly requires such act to be done by the clerk "immediately after entering the judgment."[15]

In determining whether a judgment has been entered, an appellant can rely only upon the actual entry of the judgment or order in the proper place. An entry in the clerk's register of actions noting an entry of decree in the minutes, and having reference only to an entry by the courtroom clerk in his rough daily minutes of proceedings is not such an entry as could be conclusive in favor of the appellant that the decree had been finally

7. Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

8. See JUDGMENTS.

9. Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 Pac. 868.

10. See infra, § 169.

11. Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475; Thomas v. Anderson, 55 Cal. 43; McLaughlin v. Doherty, 54 Cal. 519; Gray v. Palmer, 28 Cal. 416. See Menzies v. Watson, 105 Cal. 109, 38 Pac. 641. ("There is no other 'entry' of judgments mentioned in the code.")

12. Menzies v. Watson, 105 Cal. 109, 38 Pac. 641.

13. Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 Pac. 868.

14. Dore v. Klumpke, 140 Cal. 356, 73 Pac. 1064.

15. Code Civ. Proc., § 670.

entered.[16] And upon the same principle, a certificate of a clerk upon a copy of a decree that the decree was then on file and of record in the clerk's office does not justify the assumption that the decree has been entered at large.[17] This rule, however, has lost considerable of its force since the amendments of the code providing in effect that appeals taken after rendition and before entry of a judgment are well taken.[18]

Effect of correction or amendment of judgment.—Where there is a mere correction of a clerical error in the judgment and not the entry of a new decree, the time in which to appeal dates from the original entry of the decree, and not from the date of the correction.[19] But if proceedings to amend a judgment are instituted, the judgment rendered thereon is in effect a new decree and is the only appealable decree. An appeal taken therefrom within sixty days after it is entered is in time, although more than sixty days from the original judgment. The date the modified decree is entered must be taken as the true date of entry.[20] Indeed, an appeal taken from the original judgment pending such proceedings would be premature.[1]

Effect of errors in entry.—There is no statute expressly authorizing the making of a memorial of the terms of an order of the superior court by the method of writing it on a separate piece of paper and having the

16. Estate of Pearsons, 119 Cal. 27, 50 Pac. 929 (though the appellant is misled by such entry in the register through failure to make inquiry, that fact cannot confer rights which he otherwise does not have).

17. Estate of More, 143 Cal. 493, 77 Pac. 407.

18. See supra, § 166.

19. Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102; Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381 (an amendment correcting a clerical mistake in a judgment patent on the face of the record does not operate to extend the time for taking an appeal); Savings & Loan Soc. v. Horton, 63 Cal. 310 (clerical error as to amount of judgment).

20. Hayes v. Silver Creek & P. L. & W. Co., 136 Cal. 238, 68 Pac. 704; Mann v. Haley, 45 Cal. 63.

1. Bixby v. Bent, 59 Cal. 522.

judge attach his signature thereto, though it has become customary in many instances. And where such a memorial is made, the fact that there are some slight discrepancies between the filed order and the entry in the minute-book does not affect the validity of the minute-entry, or extend the time to appeal until another entry is made.[2]

§ 169. Judgments of Dismissal—Decrees and Orders in Probate.—The code makes special provision for judgments dismissing actions when a party fails (a) to appear on the trial and the other party appears and asks for a dismissal;[3] (b) when upon the trial and before the final submission of the case, the plaintiff abandons it;[4] and (c) when the plaintiff fails to prove a sufficient case for the jury and the defendant moves for a nonsuit.[5] The dismissals in these cases must be made, the code provides, by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered.[6] By virtue of this provision, the minutes of the court is the proper place for the entry of judgments of dismissal in the cases mentioned, and an appeal may be taken when the judgment or order is so entered, though it is not entered in the judgment-book.[7] This rule does not, however, apply to a judgment on a demurrer, though the judgment declares that the action be dismissed, for whether a judgment on demurrer declares that the plaintiff take nothing, or that the action abate, or that the

2. Tracy v. Coffey, 153 Cal. 356, 95 Pac. 150.

3. Code Civ. Proc., § 581, subd. 3.

4. Code Civ. Proc., § 581, subd. 4.

5. Code Civ. Proc., § 581, subd. 5.

6. Code Civ. Proc., § 581 (as amended in 1919). See the following cases construing Code Civ. Proc., § 581; Brown v. Sterling Mfg. Co., 175 Cal. 563, 166 Pac. 322; Young v. New Pedrara Onyx Co., 30 Cal. App. Dec. 828; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882, distinguishing Kimple v. Conway, 69 Cal. 71. See supra, § 27.

7. Matthai v. Kennedy, 148 Cal. 699, 84 Pac. 37; Marks v. Keenan, 140 Cal. 33, 73 Pac. 751; Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882.

action be dismissed, it is a final judgment on the pleadings of the relative rights of the parties so far as the particular action is concerned, and, therefore, no appeal lies from such a judgment until it is entered in the judgment-book.[8]

Entry of order for nonsuit.—The entry of an order for nonsuit which does not purport to be a judgment of any kind, but only a memorandum from which data for a judgment might be drawn, is not the entry contemplated by the code. The time for appeal does not run in such case until the entry of a proper judgment of nonsuit which operates as a final disposition of the case.[9]

Judgments or orders in probate proceedings.—The code provides that all probate orders and judgments must be entered at length in the minute-book of the court.[10] It is from the entry under this provision that the time runs in which to appeal from judgments and orders in such proceedings.[11]

§ 170. **Entry Nunc Pro Tunc.**—It is well established that where a judgment has been rendered and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made.[12] The rights of the parties in respect to an appeal are determined, however, by the date of the actual entry of the judgment; and it is clear that the court cannot by antedating an order or entry of it cut off the right of appeal,[13] or limit that

8. Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 Pac. 868.

9. Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340. See JUDGMENTS.

10. Code Civ. Proc., § 1704.

11. Estate of More, 143 Cal. 493, 77 Pac. 407 (the entry in a book of rough minutes of the memoranda of the disposition of proceedings is not the entry referred to); Estate of Sheid, 122 Cal. 528, 55 Pac. 328; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929; In re Rose, 72 Cal. 577, 14 Pac. 369.

12. See JUDGMENTS.

13. Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Pedley v. Werden, 7 Cal. Unrep. 360, 99

right.[14] Thus, a party defendant who is not mentioned in a judgment may take an appeal within sixty days after the actual entry of an order correcting the record. The fact that such order is made nunc pro tunc cannot operate to defeat his right of appeal. Indeed, he could not have appealed from the judgment originally entered because not mentioned therein.[15] The time in which to institute proceedings for review cannot commence to run until the decision is actually rendered,—i. e., until the findings are actually filed,—regardless of the day as of which they are filed.[16] And when appeals taken before entry were deemed premature, an appeal taken before the actual entry of a judgment but after the date as of which the judgment was entered was held premature.[17]

Extension of Time.

§ 171. In General.—The code provisions limiting the time in which to appeal are mandatory,[18] and the time limited cannot be extended by the court, or by any circumstances,[19] except by the pendency of proceedings on motion for a new trial.[20] The time limited cannot be enlarged by the device of moving to vacate or set aside a judgment or order, and then appealing from the order on

Pac. 975; Noce v. Daveggio, 2 Cal. Unrep. 354, 4 Pac. 495; Nolte v. Nolte, 29 Cal. App. 126, 154 Pac. 873.

14. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813 (where a defendant dies after the submission of a cause for decision, and judgment is entered nunc pro tunc as of a date prior to the death, the entry nunc pro tunc cannot have the effect of shortening the time for review on appeal).

15. Spence v. Troutt, 133 Cal. 605, 65 Pac. 1083. See supra, § 57.

16. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

17. Coon v. Grand Lodge, 76 Cal. 354, 18 Pac. 384.

18. See supra, § 165.

19. Bornheimer v. Baldwin, 42 Cal. 27 (neither the pendency of an appeal from an order denying a new trial, nor any other circumstance, can operate to prolong the time to appeal); Harper v. Minor, 27 Cal. 107; Leake v. Venice (Cal. App.), 185 Pac. 424. See infra, this section, as to mailing notice; and infra, § 172, as to stipulations of parties.

20. See infra, § 173.

the motion.[1] Neither can the time to appeal from an order be enlarged by a subsequent order vacating, and then reinstating it, for the reason that on the appeal from the order itself the subsequent orders form no part of the record and cannot be considered.[2]

By order of court.—Since the statutes limiting the time of appeal are jurisdictional and mandatory, it follows that, in the absence of an express authorization in the statute itself, a court has no power to extend the time for taking an appeal, or relieve an appellant from the effect of misfortune, accident, surprise or mistake. No such authorization is found in the statutes of this state.[3] Indeed, section 1054 of the Code of Civil Procedure, authorizing the judge to extend the time in which various acts including the service of notices may be done, expressly excepts from its provisions notices of appeal.[4] The court cannot extend the time of appeal even in the case of the death of a party, though the effect thereof may be to preclude an appeal from the judgment or order complained of.[5] Neither may the court, in such case, deduct from the statutory time the period intervening between the death of the party and the appointment of a personal representative, for it is a well-settled rule and principle of law, except as modified by positive enactment, that when the statute of limitations has begun

1. De la Montanya v. De la Montanya, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Kittredge v. Stevens, 23 Cal. 283 (holding that the limitation of the statutory time for an appeal cannot be evaded by subsequent renewals of a motion, even though they be varied in their terms, provided they are substantially the same). See supra, § 30.

2. Coombs v. Hibberd, 45 Cal. 174; Waggenheim v. Hook, 35 Cal. 216; Nichols v. Dunphy, 2 Cal. Unrep. 143.

3. Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486; Land v. Johnston, 156 Cal. 253, 104 Pac. 449; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387; Leake v. Venice (Cal. App.), 185 Pac. 424.

4. Land v. Johnston, 156 Cal. 253, 104 Pac. 449.

5. Estate of Turner, 139 Cal. 85, 72 Pac. 718; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264. See supra, § 65.

to run, no subsequent disability will suspend its operation.[6]

By mailing notice of appeal.—The time in which to appeal is not extended by the mailing of the notice of appeal. Though section 1013 of the Code of Civil Procedure provides that where service is made by mail, if the adverse party may exercise a right within a certain number of days after such service, the time within which such right may be exercised is extended one day for every twenty-five miles of the distance between the place of deposit and the place of address, it does not authorize any extension of the time within which a paper may be filed, or within which the service of a paper may be made upon the adverse party.[7]

§ 172. By Stipulation of the Parties.—The time within which a notice of appeal may be filed is fixed by law, and cannot be enlarged by stipulation of the parties.[8] Counsel cannot even vary the time in which to appeal by a stipulation as to the date of the entry of the judgment or order appealed from, especially when there is no element of estoppel involved which would render it inequitable to disregard the stipulation.[9] The court is not bound by the stipulations of the parties,[10] but will itself calculate the time to appeal from the date of the actual entry of the order in question. Furthermore, a stipulation cannot operate to confer jurisdiction, but only as an agreement

6. Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264. See LIMITATION OF ACTIONS.

7. McDonald v. Lee, 132 Cal. 252, 64 Pac. 250.

8. Land v. Johnston, 156 Cal. 253, 104 Pac. 449; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Wood v. Forbes, 62 Cal. 37 (dismissal of appeal for failure to file transcript where it was sought to show verbal stipulation extending the time for filing).

9. Estate of More, 143 Cal. 493, 77 Pac. 407; Estate of Scott, 124 Cal. 671, 57 Pac. 654 (where, some confusion having arisen as to the date of actual entry of an order, it was stipulated that such order was entered on a designated date); Langan v. Langan, 89 Cal. 186, 26 Pac. 764.

10. Langan v. Langan, 89 Cal. 186, 26 Pac. 764.

that the facts recited in the record are correct, which facts, and not the stipulation, must be examined to determine whether jurisdiction exists.[11] When, however, the record shows that the judgment or decree was entered and the parties stipulate to the correctness of the record, it has been held that counsel for the respondent will not be allowed to impeach the record by showing that the entry was made at another and different date subsequent to the taking of the appeal. The stipulation in such case is merely an agreement that the facts recited in the record are correct.[12]

§ 173. **By Motion for New Trial.**—Sections 939 and 941b of the Code of Civil Procedure, as amended in 1915, provide:

"If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."[13]

11. Estate of More, 143 Cal. 493, 77 Pac. 407.

12. Estate of Pichoir, 139 Cal. 694, 70 Pac. 214; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888. See Estate of More, 143 Cal. 493, 77 Pac. 407 (holding a recital in the notice of appeal that a judgment was entered on the day of its rendition and an acknowledgment of service thereof, and the use of the word "entered" by a respondent when making objection to the decree in the bill of exceptions, do not constitute a stipulation that the decree was entered, where the acknowledgment of service did not purport to be a stipulation that the recitals were true in fact).

13. Spotton v. Superior Court, 177 Cal. 719, 171 Pac. 801 (an appeal taken thirty-one days after entry of the order of denial of the motion is too late); Wilcox v. Hardisty, 177 Cal. 752, 171 Pac. 947 (though the time for appealing from the judgment under the former practice had elapsed, if there was at the time of the change in the law a proceeding on motion for new trial pending, an appeal from the judgment within thirty days after an order denying a new trial is in time); Estate of Seiler, 174 Cal. 498, 164 Pac. 401; Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019; Nave v. Taugher (Cal. App.), 193 Pac. 508; Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39. See Watt v. Bekins Van & Storage Co., 35 Cal. App. 776, 171 Pac. 832, as to effect of statute upon

The proceeding on motion for new trial referred to in this provision is the proceeding covered by sections 656 to 660 of the Code of Civil Procedure.[14] The purpose of this extension of time is to enable a party to have reviewed on appeal from a judgment, the failure or refusal of the trial court to grant his motion for new trial—amendments of our laws in other respects made at the same time as this section was amended having the effect of abolishing the right of appeal from an order denying a new trial which theretofore existed.[15] This provision is applicable to appeals from orders in probate proceedings.[16]

§ 174. Necessity That Proceeding for New Trial be Duly Initiated.—The statute applies only when the proceeding to obtain a new trial is duly initiated. The time to appeal is not extended if such proceeding is unauthorized, as where it is sought to obtain a re-examination of a motion,[17] or where it is not instituted within the time limited by law for the institution of such proceedings.[18] But if the proceeding is duly initiated within the time limited therefor, it is pending within the meaning of the statute,

right to appeal from judgment where appeal is not taken within six months under former practice.

Prior to 1915, the pendency of proceedings on motion for new trial did not extend the time for appeal from the judgment. Ackerman v. Schultz, 178 Cal. 190, 172 Pac. 609; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387.

14. A motion made under sections 663 and 663a to set aside the judgment and to have entered a different judgment on the findings of fact is not a proceeding on motion for new trial within the code, and the pendency of such motion does not extend the time in which to appeal from the judgment. Spotton v. Superior Court, 177 Cal. 719, 171 Pac. 801; Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39.

15. Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486.

16. Hardeman v. Church (Cal.), 191 Pac. 1106 (will contest); In re Estate of Nutt, 180 Cal. 419, 181 Pac. 661; Estate of Seiler, 174 Cal. 498, 164 Pac. 401 (the statute applies to an appeal from an order admitting a will to probate).

17. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019.

18. Whiting Mead Com. Co. v. Bayside Land Co., 178 Cal. 93, 172 Pac. 598 (distinguished in Estate of Nutt, 180 Cal. 419, 181 Pac. 661).

though the motion is without merit,[19] or the notice of intention is not served upon an adverse party.[20] Such objections, while good ground for denying the motion, do not deprive the trial court of jurisdiction to hear and determine it. While a losing party has ten days after receiving notice of entry of judgment in which to move for a new trial, it does not follow that if such notice is not served, he might indefinitely extend the time of appeal by waiting until he is served. Though he need not move for a new trial until he has received such notice, he is not required to wait, but may give notice of intention to move for a new trial at any time after judgment, and thereby extend the time to appeal. If he does not move for a new trial within the time in which he may appeal from the judgment, there is no proceeding for new trial pending within the meaning of the code, and the privilege of appealing from the judgment, or of having a new trial order reviewed on appeal terminates.[1]

§ 175. **Termination of Proceedings on Motion.**—The words "or other termination in the trial court of the proceedings upon such motion" for new trial refer to the termination of the proceedings by operation of law as provided in section 660 of the Code of Civil Procedure. This section provides (quoting in part) that:

"The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court."

If the proceedings to obtain a new trial are duly initiated, and no further steps are taken therein, they remain pending until disposed of by operation of law under

19. Hardiman v. Church (Cal.), 191 Pac. 1106.

20. In the Matter of Nutt, 180 Cal. 419, 181 Pac. 661, 57 Cal. Dec. 512.

1. Bates v. Ransome-Crummey Co. (Cal. App.), 184 Pac. 39.

this section of the code.[2] The trial court has no power to pass upon the motion thereafter, and subsequent orders purporting to dispose of it are inoperative, and do not affect the time to appeal.[3] The appeal must be taken within thirty days after the expiration of such three months' period, and if so taken, it is in time. Whether section 12 of the Code of Civil Procedure providing for the exclusion of the last day if it be a holiday, is applicable to this section has not been expressly determined.[4]

G. EFFECT OF APPEAL.

I. UPON JUDGMENT OR ORDER APPEALED FROM.

§ 176. Vacating Judgment or Order.—An appeal from a judgment or order of a superior court does not have the effect of vacating the judgment or order from which the appeal is taken. The code does not provide that an order appealed from shall cease to exist—be annulled—but that it cannot be enforced by a proceeding upon it.[5] It follows, therefore, that an appeal from an order setting aside a judgment does not vacate the order and revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside.[6]

In accordance with this rule, an appeal from an order setting aside the satisfaction of a judgment does not restore the entry of satisfaction. The judgment stands

2. Estate of Bergland, 177 Cal. 227, 170 Pac. 400; Moore v. Strayer, 175 Cal. 171, 165 Pac. 530 (holding the time did not commence to run until "service" on the moving party of notice of the decision of the court).

3. Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486.

4. See Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486, in which it was assumed that the statute applied.

5. More v. More, 127 Cal. 460, 59 Pac. 823; Los Angeles, P. & G. Ry. Co. v. Rumpp, 104 Cal. 20, 37 Pac. 859.

6. More v. More, 127 Cal. 460, 59 Pac. 823; Estate of Crozier, 65 Cal. 332, 4 Pac. 109. Compare supra, § 22, as to effect of appeal on order granting new trial.

precisely as though the order satisfying it had never been made, and the party in whose favor it is given may proceed upon it, at the sole peril of the appeal from the order of vacation;[7] an appeal from a judgment dissolving an attachment does not revive the attachment;[8] and so, also, an appeal from a decree denying an injunction or dissolving a preliminary injunction does not suspend the decree or revive the injunction.[9] But the trial court, at the time of rendering judgment for the defendant, has equitable jurisdiction either to continue in force a preliminary injunction pending an appeal by the plaintiff or to make an original order at that time restraining the successful party from interfering with the appellant's property pending such appeal.[10]

Judgment removing officers.—It is well settled that an appeal from an order removing an executor or administrator does not revive or restore his powers. He remains suspended from office pending the appeal;[11] and though the court may appoint a special administrator during the period of suspension, it cannot appoint a general administrator until such order of removal becomes final, as the question as to who shall be general administrator is involved in the appeal.[12] This same rule applies to an order removing a guardian.[13] A different

7. Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922.

8. Loveland v. Alvord Consol. Quartz Min. Co., 76 Cal. 562, 18 Pac. 682. See ATTACHMENT.

9. Pasadena v. Superior Court, 157 Cal. 781, 21 Ann. Cas. 1355, 109 Pac. 620; Hicks v. Michael, 15 Cal. 107. And see infra, § 196.

10. Southern Pacific Co. v. Smith, 171 Cal. 8, 151 Pac. 426; Pasadena v. Superior Court, 157 Cal. 781, 109 Pac. 620; Mulvey v. Superior Court, 22 Cal. App. 514, 135 Pac. 53. See INJUNCTION.

11. More v. More, 127 Cal. 460, 59 Pac. 823; Estate of Moore, 86 Cal. 72, 24 Pac. 846; Estate of Crozier, 65 Cal. 332, 4 Pac. 109 (an appeal from an order revoking the probate of a will does not revive the powers and functions of the former executor); More v. Miller, 6 Cal. Unrep. 78, 53 Pac. 1077; Estate of Chadbourne, 14 Cal. App. 481, 112 Pac. 472.

12. Estate of Moore, 86 Cal. 72, 24 Pac. 846. See EXECUTORS AND ADMINISTRATORS.

13. Guardianship of Van Loan, 142 Cal. 429, 76 Pac. 39. See GUARDIAN AND WARD.

rule obtains, however, where the officer or officers removed be a sheriff, a board of supervisors, or the like. In such case it has been held that the appeal restores the officer to his rights of office until its final determination.[14]

§ 177. Upon Finality of Judgment.—The code expressly declares that an action is deemed pending while an appeal from the judgment is pending.[15] Although a judgment may be final with reference to the trial court which rendered it, and, as such, be the subject of an appeal,[16] yet it is not a final determination of the rights of the parties pending its review upon appeal.[17] A judg-

14. Morton v. Broderick, 118 Cal. 474, 50 Pac. 644 (holding that as the appeal restored the board of supervisors to office, and where the offices were never abandoned, a new board claiming the right to act are not even officers de facto. "Even if it be said that the judgment was self-executing, and that a vacancy existed upon the entry of judgment by operation of law and without process of the court, it must necessarily follow . . . that it existed only until an appeal from the judgment was perfected, and that this appeal restored the incumbent to his rights of office until final determination of the controversy"); Covarrubias v. Board of Supervisors, 52 Cal. 622 (an appeal from an order removing a sheriff ipso facto, operates as a supersedeas, and a board of supervisors will be restrained by writ of prohibition from filling the vacancy). See PUBLIC OFFICERS.

15. Code Civ. Proc., § 1049; Gilmore v. American C. I. Co., 65 Cal. 63, 2 Pac. 882.

16. See supra, § 18.

17. Estate of Ricks, 160 Cal. 467, 117 Pac. 539; People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866; Di Nola v. Allison, 143 Cal. 106, 101 Am. St. Rep. 84, 65 L. R. A. 419, 76 Pac. 976 (by the appeal the effect of the judgment as evidence of the matters determined by it is suspended, even though its execution is not stayed); Greer v. Greer, 142 Cal. 519, 77 Pac. 1106; Smith v. Smith, 134 Cal. 117, 66 Pac. 81; Broder v. Conklin, 121 Cal. 289, 53 Pac. 797; Purser v. Cady, 120 Cal. 214, 52 Pac. 489; Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58; People v. Beevers, 99 Cal. 286, 33 Pac. 844; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Ward v. Matthews, 80 Cal. 343, 22 Pac. 187; People v. Treadwell, 66 Cal. 400, 5 Pac. 686 (disbarment proceedings based on a judgment convicting an attorney of a felony are premature if brought pending an appeal from the judgment); Gillmore v. American C. I. Co., 65 Cal. 63, 2 Pac. 882 (explained in People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866; Hills v. Sherwood, 33 Cal. 474; McGarrahan v. Maxwell, 28 Cal. 75; People v.

ment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in a cause. Hence, it has been repeatedly held that the operation of a final judgment is suspended by an appeal therefrom, so that pending such appeal the judgment is not admissible in another case as evidence, even between the same parties.[18] Under this rule a judgment is not admissible in bar of another action on the same cause of action or relating to the same subject matter, pending an appeal therefrom.[19] The justice of this rule is apparent from the fact that an appealable

Frisbie, 26 Cal. 135; Woodbury v. Bowman, 13 Cal. 635; Knowles v. Inches, 12 Cal. 213 (a judgment determining title is not conclusive evidence of title in another action when it is suspended by an appeal); Collins v. Ramish, 28 Cal. App. Dec. 844; Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075; Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 505; Sharon v. Hill, 26 Fed. 337, 346, 11 Sawy. 290. See JUDGMENTS.

Excepting when ordered by supersedeas or permitted by stay bond, an appeal from an order denying a new trial, under the former practice, in no way suspended the judgment nor interfered with its finality. It was in this respect more in the nature of an equitable bill of review which, while countenanced in proper cases even after a judgment of affirmance upon appeal, never operated in and of itself to suspend the decree. The decision which the court renders on such appeal is not upon the judgment, but upon the order appealed from, and while the effect of its reversal of the order will, of course, be necessarily the setting aside of the judgment, this is but an incident to the ruling which it makes, which ruling goes not at all to the sufficiency or finality of the judgment, but only as to whether, within familiar rules and limitation, the judgment was fairly given. People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866.

18. Baker v. Eilers Music Co., 175 Cal. 652, 166 Pac. 1006; Estate of Blythe, 99 Cal. 472, 34 Pac. 108; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Sharon v. Hill, 26 Fed. 337, 11 Sawy. 290. See Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817 (holding error harmless because the judgment became final before the close of the trial).

19. Baker v. Eilers Music Co., 175 Cal. 657, 166 Pac. 1008; Fresno Milling Co. v. Fresno Canal & Irr. Co., 4 Cal. Unrep. 592, 36 Pac. 412; Story v. Story & Isham Commercial Co., 100 Cal. 41, 34 Pac. 675; Naftzger v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757. See JUDGMENTS.

judgment might be reversed, after having been used to perpetually bar an action.[20]

The rule does not, however, preclude the use of the judgment for any purpose whatsoever.[1] It may be offered in evidence whenever the mere fact that it has been entered is material, as, for instance, to show the regularity of an execution,[2] or in support of a plea in abatement.[3] But as such a plea can be sustained only when the plaintiffs in the action and the cause of action are the same,[4] a better mode to avoid an unjust conclusion, in general, is to move for a continuance until the final determination of the suspended judgment, when it can be used as evidence.[5] The judgment may also be used to establish an indirect or contingent right. For instance, in a suit to quiet title, the title of the plaintiff may be quieted, subject to a claim of the defendant under a judgment from which an appeal is pending.[6]

20. Cook v. Ceas, 143 Cal. 221, 77 Pac. 65.

1. Greer v. Greer, 142 Cal. 519, 77 Pac. 1106 (holding judgment-roll in separate maintenance suit admissible in divorce action grounded on same desertion to preclude a retrial of the alleged desertion); California Mortgage & Sav. Bank v. Graves, 129 Cal. 649, 62 Pac. 259 (holding a decree of foreclosure to be admissible on application for writ of assistance, where no stay of execution was had); Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405 (holding judgment admissible in action by judgment creditor to set aside a fraudulent conveyance of the judgment debtor).

2. Cook v. Ceas, 143 Cal. 221, 77 Pac. 65; Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878 (a defendant in an ejectment suit claiming under an execution sale may, notwithstanding an appeal, introduce the judgment in evidence as a collateral fact in support of execution).

3. Baker v. Eilers Music Co., 175 Cal. 657, 166 Pac. 1008; Cook v. Ceas, 143 Cal. 221, 77 Pac. 65; Smith v. Smith, 134 Cal. 117, 66 Pac. 81.

4. See ABATEMENT AND REVIVAL, vol. 1, p. 31.

5. Baker v. Eilers Music Co., 175 Cal. 657, 66 Pac. 1008; Smith v. Smith, 134 Cal. 117, 66 Pac. 81; Haskins v. Jordin, 123 Cal. 157, 55 Pac. 786 (a motion to offset judgments will be retained until final decision of an appeal from one of the judgments to be set off); Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433.

6. Smith v. Smith, 134 Cal. 117, 66 Pac. 81.

II. Upon Jurisdiction of Lower Court.

§ 178. In General.—The service and filing of a proper notice of appeal from final judgment in an action transfers the action from the superior court to the appellate court,[7] and divests the superior court of further jurisdiction in the cause except as to matters not affected by the judgment or order appealed from.[8] The trial court has no longer any power or control over the action,[9] and cannot proceed further as to matters embraced in the judgment until the appeal is heard and determined and its jurisdiction is restored.[10] It cannot change the order appealed from,[11] or make any other order or do any other act in the case materially affecting the order appealed from.[12] After an appeal has been taken, the trial court below has no authority to make new or further findings in the cause in regard to the matters involved,[13] or ren-

7. Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894; Collins v. Ramish, 28 Cal. App. Dec. 844; Stateler v. Superior Court, 107 Cal. 536, 40 Pac. 949.

8. In re Waters' Estate, 181 Cal. 584, 185 Pac. 951; Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174; Kaufman v. Superior Court, 108 Cal. 446, 41 Pac. 476; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; People v. Center, 54 Cal. 236. See infra, § 180, as to collateral matters.

9. Estate of Waters, 181 Cal. 584, 185 Pac. 951; People v. Center, 54 Cal. 236; Stansbury v. Frazer (Cal. App.), 189 Pac. 497.

10. Stansbury v. Frazer (Cal. App.), 189 Pac. 497; Kaufman v. Superior Court, 108 Cal. 446, 41 Pac. 476; Durbrow v. Chesley, 24 Cal. App. 416, 141 Pac. 631; Durbrow v. Chesley, 23 Cal. App. 627, 138 Pac. 917.

11. See infra, § 179.

12. Durbrow v. Chesley, 23 Cal. App. 627, 138 Pac. 917.

13. Hayes v. Wetherbee, 60 Cal. 399; Baggs v. Smith, 53 Cal. 88; In re Bullard's Estate, 3 Cal. Unrep. 688, 31 Pac. 1119; Colusa & H. R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 Pac. 1011; Pashgian v. Stephenson, 10 Cal. App. 36, 100 Pac. 1075 (the fact that, subsequently to the rendition of the new findings and judgment, the appellant dismissed his appeal from the former judgment cannot affect the question involving the power of the trial court to render the same while the former appeal was actually pending). See Auzerais v. Superior Court, 101 Cal. 542, 36 Pac. 6 (holding that a finding made pending an appeal would not be annulled upon writ of review as it would be disregarded on the appeal if made without authority).

der any judgment thereon,[14] though it may correct the findings made so as to give true expression to its decision.[15] Pending an appeal from an order vacating a judgment of dismissal, the lower court cannot proceed with the trial of the cause;[16] nor may it do so pending an appeal from an order granting a new trial.[17]

Injunctions pending appeal.—Though the trial court in denying an injunction has power by provisional injunction to maintain the status quo pending appeal,[18] it has no power to make orders modifying the injunction after the perfection of an appeal.[19]

When jurisdiction is transferred.—The appellate court acquires jurisdiction immediately upon the perfecting of the appeal from the trial court, though the record is not filed therein until later.[20] It follows from the principles stated that a superior court has no power to dismiss an appeal taken from its judgments or orders;[1] and it cannot make an order forbidding the clerk to certify to a proposed transcript.[2]

§ 179. On Power to Amend, Vacate and Enforce Judgment.—An appeal has the effect of removing from the jurisdiction of a trial court the subject matter of the judgment or order appealed from,[3] including all questions going to

14. Pashgian v. Stephenson, 10 Cal. App. 36, 100 Pac. 1075.

15. Bixby v. Bent, 59 Cal. 522. See infra, § 182.

16. Livermore v. Campbell, 52 Cal. 75.

17. Ford v. Thompson, 19 Cal. 118.

18. See supra, § 176.

19. Mulvey v. Superior Court, 22 Cal. App. 514, 135 Pac. 53. See INJUNCTION.

20. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805; Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711 (immediately upon the filing of the notice of appeal the appellate court has jurisdiction).

As an appeal is not perfected until the notice of appeal is both served and filed, the judgment creditor, though served with notice of appeal, is at liberty at any time before the notice is filed to proceed to enforce his judgment. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 Pac. 1047.

1. Collins v. Ramish, 28 Cal. App. Dec. 844.

2. People v. Center, 54 Cal. 236.

3. See supra, § 178.

the validity or correctness of such judgment or order.[4] The trial court has not power thereafter to amend or correct its judgment or order,[5] or to vacate or set it aside.[6] Such power cannot be reinvested in the trial court even by the consent of the parties.[7] Of course, circumstances can be imagined under which a power in the trial court to change a judgment or order while an appeal is pending can be wisely used; for example, in a divorce case for the welfare of children. But, in reply to this argument, it was held in a recent case that the effect of an appeal

4. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805; Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473; Stateler v. Superior Court, 107 Cal. 536, 40 Pac. 949.

5. Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894; Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473 (pending an appeal taken from a judgment of divorce, which includes a judgment awarding the custody of minor children, the trial court has no jurisdiction to change or modify the judgment as to the custody of children. Section 138 of the Civil Code has no reference to the subject of appeals); Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237; Stateler v. Superior Court, 107 Cal. 536, 40 Pac. 949; San Francisco Sav. Union v. Myers, 72 Cal. 161, 43 Pac. 403 ("We think it very plain that the superior court cannot deprive this [the supreme] court of jurisdiction of an appeal from a judgment by amending the judgment while the appeal is pending here"); Bryan v. Berry, 8 Cal. 130; Stansbury v. Frazer (Cal. App.), 189 Pac. 497 (an order releasing certain bonds theretofore required to be deposited with the clerk pending payment of plaintiff's judgment is in effect a modification of the judgment and cannot be made pending an appeal from the judgment). See infra, § 182, as to correction of record to properly express judgment rendered.

6. Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805 (cited in Eggers v. Krueger, 236 Fed. 852, 855, 150 C. C. A. 114, and holding that pending appeal a trial court cannot vacate a judgment on the ground of want of jurisdiction of the person); Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; Baker v. Borello, 131 Cal. 615, 63 Pac. 914; Peycke v. Keefe, 114 Cal. 212, 46 Pac. 78 (the court cannot set aside the judgment on its own motion); Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119; Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605; McGarrahan v. New Idria Min. Co., 49 Cal. 331 (it prevents any action of the district court of the United States from which an appeal is taken from vacating the order granting an appeal); In re Dupes, 31 Cal. App. 698, 161 Pac. 276 (pending an appeal from an order as to the custody of minor children, the trial court cannot make any other disposition of the children).

7. Kinard v. Jordan, 175 Cal. 13, 164 Pac. 894.

from a judgment or order is purely a matter of statutory regulation to be determined by a construction of the statute under which the appeal is taken. If the terms of the statute are clear and not ambiguous, the courts are obliged to enforce it, though it may be of the opinion that such enforcement will be attended with evil consequences.[8]

Enforcement of judgment.—An appeal without supersedeas does not suspend the power of the trial court to issue execution.[9] And pending an appeal without stay bond from a judgment in a replevin suit, the plaintiff has the right to require the defendant to deliver the property in compliance with the terms of the judgment.[10]

A superior court does not have general power to stay the execution of its judgments after the perfection of an appeal therefrom,[11] though it seems to have the power to compel the sheriff to observe the stay of execution given by statute.[12]

§ 180. Over Collateral Matters.—It is provided by the code that notwithstanding the perfection of an appeal and stay of all proceedings upon the judgment or order appealed from and matters embraced therein, the superior court may nevertheless "proceed upon any other matter embraced in the action and not affected by the order appealed from."[13] Hence, an appeal does not operate to divest a trial court of jurisdiction to hear and determine questions arising in proceedings independent

8. Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473 (citing Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58); Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956.

9. Bryan v. Berry, 8 Cal. 130. See infra, § 185 et seq., as to supersedeas and stay of proceedings. See JUDGMENTS as to right to bring an action upon a judgment pending appeal.

10. Mortgage Securities Co. v. Pfaffman (Cal. App.), 190 Pac. 641.

11. Mannix v. Superior Court, 157 Cal. 730, 109 Pac. 264.

12. See infra, § 225.

13. Code Civ. Proc., § 946 (in part); San Francisco Gas & Elec. Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359.

of and collateral to the proceeding wherein the judgment or order appealed from was rendered.[14] It does not, for example, deprive the trial court of jurisdiction to entertain a motion for new trial,[15] to settle a bill of exceptions,[16] or to issue a commission to take the deposition of a witness with a view to its use upon a new trial of the action if one is awarded on the appeal.[17] Pursuant to this rule, an appeal from a decree of divorce does not deprive a trial court of jurisdiction to make an order for alimony;[18] and appeal from an order granting general letters of administration does not affect the jurisdiction of the court over a distinct proceeding of special administration to preserve the estate until general letters are granted.[19] Where a receiver is appointed to protect property until the judgment, his functions cease with the judgment, and the trial court has jurisdiction pending an appeal from the judgment to entertain a motion to discharge him.[20]

§ 181. On Power to Entertain Motion for New Trial.— Proceedings on a motion for a new trial are not in direct line of the judgment, but are independent and collateral thereto. Therefore, an appeal from a judgment does not divest a trial court of jurisdiction to hear and determine a motion for new trial.[1] This rule is unchanged by the

14. Estate of Waters, 181 Cal. 584, 185 Pac. 951.

15. See infra, § 181.

16. Colbert v. Rankin, 72 Cal. 197, 13 Pac. 491. See infra, § 182.

17. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 17 Ann. Cas. 933, 99 Pac. 359.

18. Reilly v. Reilly, 60 Cal. 625 (in which the appellate court refused to entertain a motion for alimony pending the appeal, as jurisdiction was in the trial court).

19. Estate of Heaton, 142 Cal. 116, 75 Pac. 662 (pending an appeal from an order granting general letters, the court has jurisdiction to order a special administrator to turn over all the property in his possession to a special administratrix appointed by the court).

20. Broder v. Conklin, 121 Cal. 289, 53 Pac. 797; Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207.

1. In re Waters' Estate, 181 Cal. 584, 185 Pac. 951; Miller & Lux v. Enterprise Canal & L. Co., 169 Cal. 415, 47 Pac. 567; Knowles

amendments of 1915 denying appeals from orders on motion for new trial except in one instance, and authorizing a review of such orders on an appeal from the judgment. To hold that the proceeding on motion for new trial is independent where an appeal is allowed, and dependent in cases where an appeal is denied and the order is reviewable on appeal from the judgment would cause considerable confusion, and it has been held that in all cases the trial court is authorized to entertain a motion for new trial pending an appeal from the judgment.[2]

On the motion for new trial, the trial court has jurisdiction, notwithstanding the appeal, to insist upon the acceptance of a modification of the judgment as a condition of refusing a new trial, for the reason that this is a proper order in the proceeding for new trial.[3] If the court should reduce the judgment pursuant to an acceptance of a conditional order denying a new trial, such order is not the entry of a new judgment. It does not destroy an appeal from the judgment already taken, nor necessitate the taking of a new appeal from the judgment as so reduced.[4]

§ 182. Over Court Records.—While a trial court by an appeal loses jurisdiction of a cause for the purposes of an appeal, it does not thereby lose jurisdiction of its records. These remain within its physical custody and control, and it has the right after an appeal is taken as before to correct clerical mistakes appearing upon the face of the record.[5] In a case where the clerk of the

v. Thompson, 133 Cal. 245, 65 Pac. 468; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Rayner v. Jones, 90 Cal. 78, 27 Pac. 24 (since the court should hear the motion instead of dismissing it, an appeal from an order of dismissal will be treated as an order denying a motion for new trial); Naglee v. Spencer, 60 Cal. 10; Fuller v. United States, 182 U. S. 562, 572, 45 L. Ed. 1230, 21 Sup. Ct. Rep. 871.

2. Estate of Waters, 181 Cal. 584, 185 Pac. 951 (on rehearing).

3. Machado v. Machado, 36 Cal. App. 646, 172 Pac. 1124.

4. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769.

5. Boust v. Superior Court, 162 Cal. 343, 122 Pac. 956; San Fran-

court inadvertently enters findings delivered to him for the judge, as the judgment of the court, before the judge has seen or examined them, the rule is given that the trial court has power to set aside such purported judgment, although an appeal has been taken therefrom.[6] Such amendments do not make any change in the judicial action of the court, and make no change in the orders appealed from, but merely correct a misprision of the clerk in entering the order and make the record state the truth.[7] So, also, the taking of an appeal does not impair the power of the trial court to supply the place of its records when lost, by the aid of copies or some other means under its control.[8]

§ 183. When Appeal is from Interlocutory Order.—An appeal from an interlocutory order does not divest the trial court of its jurisdiction over the remainder of the case not involved in the appeal.[9] For example, an appeal from an order relating to the accounts of a trustee before a specified date does not divest a trial court of jurisdiction to make orders in reference to accounts subsequent thereto.[10] On like principle, it has been held that, pending an appeal by the plaintiff from an order dissolving an attachment as to one defendant, the trial court can entertain a motion to dissolve by another defendant.[11] And further, though an injunction pendente lite preventing the interference with possession of prop-

cisco v. Brown, 153 Cal. 644, 96 Pac. 281 (courts have power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered, so that the record shall contain the actual decision of the court); Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174 (clerical error as to name of party); Bixby v. Bent, 59 Cal. 522.

6. City Properties Co. v. Meacham, 33 Cal. App. 696, 166 Pac. 593.

7. Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657.

8. Buckman v. Whitney, 24 Cal. 267.

9. Willett v. Alpert, 181 Cal. 652, 185 Pac. 976; Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579; Gardner v. Stare, 6 Cal. Unrep. 945, 69 Pac. 426.

10. Gardner v. Stare, 6 Cal. Unrep. 945, 69 Pac. 426.

11. Willett v. Alpert, 181 Cal. 652, 185 Pac. 976.

erty is appealable and a stay bond prevents such change of possession pending appeal, yet such appeal does not preclude the court from proceeding to final decree.[12]

§ 184. Effect of Void Appeal.—An appeal which is absolutely void does not remove the cause from the superior court or divest it of jurisdiction. In such case the cause remains in the trial court as undisturbed as though no attempt had been made to remove it to a higher court.[13] For example, the taking of an appeal before the rendition of judgment does not deprive the trial court of power to render judgment.[14] Likewise, the taking of an appeal from a judgment pending proceedings to correct or amend the findings and judgment is premature, and does not divest the trial court of power to correct its judgment.[15] But, as it is presumed that an attorney acting for a party has authority to do so, the trial court cannot treat an appeal as void because of want of authority in the attorney to take the appeal. The place to assail a purported appeal because of such lack of authority is in the appellate court.[16]

H. SUPERSEDEAS AND STAY OF PROCEEDINGS.

I. INTRODUCTORY.

§ 185. Definition and Nature.—A supersedeas is a suspension of the power of the court below to issue an execution on a judgment or decree from which an appeal

12. Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579 (holding that where a permanent injunction is included in the final decree in such case, the injunction pendente lite expires with the decree and nothing further can be claimed by virtue thereof).

13. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64; Brady v. Burke, 90 Cal. 1, 27 Pac. 52; Home for Care of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119.

14. Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

15. Bixby v. Bent, 59 Cal. 522.

16. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805.

has been taken, or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ.[17] Its object is to stay proceedings in the court below upon a judgment or order appealed from, and to suspend the enforcement of that judgment or order until the determination of the appeal.[18] Originally, at common law a supersedeas was a writ directed to a ministerial officer commanding him to desist from enforcing the execution of another writ which he was about to execute or which might come into his hands.[19] In modern times, the term is often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment. For example, the Code of Civil Procedure declares that in certain cases the perfecting of an appeal by the giving of a stay bond, and in a generality of cases the perfecting of an appeal by giving a three hundred dollar undertaking on appeal, stays proceedings in the court below upon the judgment or order appealed from. In other words, the perfection of an appeal creates a statutory supersedeas.[20] There is in this state also a supersedeas upon order of court or upon a writ of supersedeas. This writ is an auxiliary process designed to supersede the enforcement of the judgment brought up for review.[1] It may issue where the trial court or its officers seek to enforce its judgment in violation of a statutory supersedeas effectuated by an appeal or stay bond as the case may be.[2] It may issue, also, where the statute makes no pro-

17. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Hovey v. McDonald, 109 U. S. 150, 159, 27 L. Ed. 888, 3 Sup. Ct. Rep. 136.

18. Hoppe v. Hoppe, 99 Cal. 536, 34 Pac. 222.

19. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Tyler v. Presley, 72 Cal. 290, 13 Pac. 856.

20. See infra, § 187.

1. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Kaiser v. Hancock, 25 Cal. App. 325, 143 Pac. 614 (stating that a supersedeas is "ancillary" process).

2. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123 (where the court says: "In this state the writ is frequently granted by this

vision for a supersedeas and the writ is necessary to preserve the status quo, so that rights involved may not be lost or prejudiced by the enforcement of the judgment.[3]

§ 186. Necessity of Appellate Proceedings.—A supersedeas or stay of proceedings upon a judgment, herein discussed, is an incident to the appeal in which such supersedeas or stay is sought. Being merely an incident to an appeal, it follows that there can be no supersedeas or stay if an appeal is void, either because the order from which the appeal is taken is not an appealable order,[4] or because the appeal was prematurely taken,[5] or because it is otherwise void.[6] When, however, a motion to dismiss an appeal on the ground that the order appealed from is not an appealable order is continued until the hearing of the appeal on the merits, it is the duty of the superior court to refrain from its enforcement pending the motion to dismiss.[7] The refusal to dismiss is as effectual for the purposes of supersedeas as if determined for all purposes. Its effect is that the appellate court is thus far entertaining the appeal.[8]

[the supreme] court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or upon appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment"). See infra, § 215.

3. See infra, §§ 216, 217.

4. Hale & Norcross Silver Mining Co. v. Fox, 122 Cal. 56, 54 Pac. 270; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381.

5. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64.

6. Hughes v. Moncur, 28 Cal. App. 462, 152 Pac. 968 (where notice of appeal was fatally defective).

7. Hale & Norcross Silver Min. Co. v. Fox, 122 Cal. 56, 54 Pac. 270; Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 21.

8. Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211.

II. UPON SECURITY.

When is Security Required.

§ 187. In General.—It is a general rule in California that the perfecting of an appeal by giving a three hundred dollar undertaking creates a statutory supersedeas and stays proceedings upon the judgment or order appealed from.[9] In certain exceptional cases a supersedeas can be had only upon giving security, in addition to the ordinary appeal bond, either an undertaking to stay execution,[10] or a deposit in the trial court of the amount of the judgment appealed from, and three hundred dollars in addition,—unless the undertaking or deposit be waived by the written consent of the respondent.[11] These exceptional cases include a judgment or order directing the payment of money,[12] a judgment or order directing the assignment or delivery of documents or personal property,[13] a judgment or order appointing a receiver,[14] a judgment or order directing the sale of personal property upon the foreclosure of a mortgage thereon,[15] a judgment or order directing the execution of a conveyance or other

9. See infra, § 192.

10. See Code Civ. Proc., §§ 942–945, inclusive, referred to infra this section.

11. Code Civ. Proc., § 948; Carit v. Williams, 67 Cal. 580, 8 Pac. 93 (such waiver is sufficient to stay execution of the order appealed from).

12. Code Civ. Proc., § 942. See infra, § 188.

13. Code Civ. Proc., § 943.

14. Code Civ. Proc., § 943; Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826 (citing the code section).

15. Code Civ. Proc., § 943; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69 (judgment directing sale of personal property mortgaged by the terms of a trust deed); Tolle v. Heydenfeldt, 138 Cal. 56, 70 Pac. 1013 (holding that a judgment declaring the lien enforced to be "plaintiff's mortgage and lien" shows that the lien dealt with is a mortgage). See infra, this section.

This provision was added to the code in 1897. Prior thereto the three hundred dollar undertaking on appeal effected a stay. Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070; Powers v. Crane, 67 Cal. 65, 7 Pac. 135; Snow v. Holmes, 64 Cal. 232, 30 Pac. 806.

instrument,[16] and a judgment or order directing the sale or delivery of possession of real property.[17] Construing sections 942 to 945, inclusive, it has been held and it must now be taken as absolutely settled by the decisions that these sections apply only to cases where the appellant has money or other property in his possession which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent, and where it would be unjust to allow the appellant to retain the possession of the property and perhaps dissipate it, or put it out of his power to perform the act required, without securing the respondent by a bond.[18] For example, section 943 of the Code of Civil Procedure, relating to judgments directing the sale of personal property upon the foreclosure of a mortgage thereon, does not apply to a judgment foreclosing a pledge, for the reason that in the case of a pledge, the pledgor has done all that could be done to transfer and assign the property as security for the indebtedness. It follows that such a judgment may be stayed by an undertaking for three hundred dollars under section 941 of the code.[19] Similar considerations are applicable to other judgments under the statutory exceptions.[20]

16. Code Civ. Proc., § 944.

17. See infra, § 190.

18. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075; Rohrbacher v. Superior Court, 144 Cal. 631, 78 Pac. 22; Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58 ("The judgments or orders referred to in sections 942–945 are such as direct some act to be done by the appellant, or require some process for their enforcement"); Estate of Woods, 94 Cal. 566, 29 Pac. 1108; Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617; Estate of Schedel, 69 Cal. 241, 10 Pac. 334 (the statutory exceptions apply to appellants who are required to perform the directions of the judgment or order appealed from). And cases cited infra, §§ 188–190.

19. Rohrbacher v. Superior Court, 144 Cal. 631, 78 Pac. 22; Commercial & Sav. Bank v. Hornberger, 134 Cal. 90, 66 Pac. 74. See Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69, distinguishing the Rohrbacher case, cited supra.

20. See infra, §§ 188–190.

The ordinary undertaking on appeal and an undertaking to stay proceedings on a judgment are distinct from each other. The former is necessary to confer jurisdiction upon the court of appeals[1], while the latter is not jurisdictional, but is only given to preserve the appellant the benefits of his appeal.[2] It is optional with an appellant whether to file an undertaking to stay proceedings and obtain a supersedeas.[3]

§ 188. When Judgment Directs Payment of Money.—Section 942 of the Code of Civil Procedure provides that "if the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless" the undertaking therein prescribed be given to secure to the judgment creditor the fruits of the judgment in the event of its affirmance or of the dismissal of the appeal.[4] This section applies only to a judgment which directs the payment by the appellant of a specific amount of money, and which can be directly enforced by a writ of execution.[5] It has no application to a judgment which may be satisfied in either of two or more modes,[6] such as a judgment in an action of claim and delivery which is in the alternative, primarily for the return of the property and incidentally for the value thereof if a return cannot be had.[7] Nor does this statute apply to a judgment which cannot be enforced against the defendant until after the plaintiff has exhausted another remedy, and where he is person-

1. See supra, § 136.

2. McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845.

3. Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95.

4. Whitaker v. Title Ins. & Trust Co., 179 Cal. 111, 175 Pac. 460 (holding the judgment to be one directing the payment of money); Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478.

5. Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383; Colusa & H. R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 Pac. 1011; Churchill v. More, 7 Cal. App. 767, 96 Pac. 108; Olsen v. W. H. Birch & Co., 1 Cal. App. 99, 81 Pac. 656. See, also, cases cited supra, § 187.

6. Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383; Churchill v. More, 7 Cal. App. 767, 96 Pac. 108.

7. Churchill v. More, 7 Cal. App. 767, 96 Pac. 108. See infra, § 189.

ally liable for only a deficiency in the proceeds of certain property primarily chargeable therefor.[8] And it is not applicable where the fund in litigation is not in the possession of the appellant but is in the possession of the court at the time of the rendition of the judgment and the taking of the appeal.[9]

Judgment for costs.—A judgment for costs is not a judgment for money contemplated by section 942. If it were, a stay bond would be required in almost every conceivable case, when, to the contrary, it is required only in the cases covered by sections 942 to 945 of the code.[10] So, also, the fact that costs are awarded does not characterize a judgment which would not otherwise be deemed a money judgment.[11] An order refusing to strike out a cost bill is not an order directing the payment of money, but is in effect a denial of a motion to modify a judgment, and any execution issued must be founded on the judgment, not the order denying the motion.[12]

In miscellaneous proceedings.—A judgment for alimony which by its terms is made a lien upon certain real estate and directs the appointment of a receiver of said realty to

8. Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71; Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383; Central Lumber & M. Co. v. Center, 107 Cal. 193, 40 Pac. 334 (judgment in a mechanic's lien suit); Boob v. Hall, 105 Cal. 413, 38 Pac. 977 (holding that a judgment in a mortgage foreclosure suit for an unascertained deficiency is not within the scope of Code Civ. Proc., § 942); Painter v. Painter, 98 Cal. 625, 33 Pac. 483.

Such a judgment may be embraced within section 945 of the Code of Civil Procedure. See infra, § 190.

9. Broder v. Conklin, 121 Cal. 289, 53 Pac. 797; McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442, 33 Pac. 329 (a judgment in interpleader where the fund in dispute was deposited in court).

10. Whitaker v. Title Ins. & Trust Co., 179 Cal. 111, 175 Pac. 460; McCallion v. Hibernia Sav. & Loan Society, 98 Cal. 442, 33 Pac. 329; Estate of McGinn, 3 Cof. Prob. Dec. 127.

11. Estate of McGinn, 3 Cof. Prob. Dec. 127 (a decree revoking probate of a will and awarding costs is not a judgment directing the payment of money).

12. Reay v. Butler, 118 Cal. 113, 50 Pac. 375.

pay the alimony out of the income thereof as it accrues does not direct the payment of any money to the plaintiff and is not enforceable by execution against other estate of the defendant within the rule.[13] The same is true of a judgment foreclosing liens against a vessel which does not direct the entry of a personal judgment.[14] So, also, a judgment of condemnation in eminent domain proceedings prior to the expiration of the thirty day period in which the plaintiff is required to pay the amount assessed, as such judgment is not directly enforceable by execution within the rule, but is rather a conditional award upon payment of the price for the land.[15] An order under section 685 of the Code of Civil Procedure granting leave to have execution issued after the lapse of five years cannot be regarded as a judgment directing the payment of money, even though it purports to direct the payment of money. Any such direction is without authority and void and does not characterize the order. Since section 942 does not embrace such order itself, it does not embrace an order denying a motion to vacate such order, as such order is purely negative.[16] Other instances will be noted later where judgments are not deemed to be within the scope of any of the statutory exceptions, and hence, of course, not within the contemplation of section 942 of the Code of Civil Procedure.[17]

§ 189. Judgments Directing Assignment or Delivery of Documents or Personalty.—Section 943 of the Code of Civil Procedure provides for the stay upon security of judgments which "direct the assignment or delivery of documents or personal property."[18] While this section

13. Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61. See ALIMONY AND SEPARATE MAINTENANCE, vol. 1, p. 1048.

14. Olsen v. W. H. Birch & Co., 1 Cal. App. 99, 81 Pac. 656.

15. Colusa & H. R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 Pac. 1011. See infra, § 193.

16. Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070.

17. See infra, § 193.

18. Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579.

does not apply to a case where the fund in question is in the possession of the court,[19] it clearly includes an order requiring a sheriff to deliver documents or personal property,[20] and an order directing an insolvent to turn over certain assets to a receiver in insolvency proceedings.[1] Under this section a defendant in a claim and delivery suit is required to give a stay bond,[2] even though he may have given a redelivery bond under section 514 of the Code of Civil Procedure.[3] A decree enjoining a partner who had unlawfully excluded the plaintiff from the premises occupied by a firm from interfering with the plaintiff in the exercise of his rights and duties as managing partner is in effect a decree directing a delivery of the possession of real and personal property within the meaning of section 943 of the Code of Civil Procedure.[4]

While it was intimated in an early case that the term "personal property" as used in this statute does not include money,[5] the term undoubtedly includes money where it is a special fund capable of identification.[6]

§ 190. Judgments Directing Sale or Delivery of Real Property.—Section 945 of the Code of Civil Procedure provides that "if the judgment or order appealed from direct the sale or delivery of possession of real prop-

19. McCallion v. Hibernia Sav. & L. Society, 98 Cal. 442, 33 Pac. 329. See supra, § 187.

20. Bailey v. Superior Court, 31 Cal. App. 78, 159 Pac. 990. (Distinguishing Palache v. Hunt, 64 Cal. 473, 2 Pac. 245, and Ballagh v. Superior Court, 25 Cal. App. 149, 142 Pac. 1123, in which cases the facts were not such as to bring them within the provisions of section 943).

1. Ex parte Clancy, 90 Cal. 553, 27 Pac. 411.

2. United States Fidelity & G. Co. v. More, 155 Cal. 415, 101 Pac. 302.

3. Swasey v. Adair, 88 Cal. 203, 26 Pac. 83 (holding that the language of section 514 of the code is not at all inconsistent with the proposition that a judgment for the plaintiff in such action is immediately enforceable by a return of the property in specie, unless the defendant gives an additional bond to stay proceedings pending his appeal). See CLAIM AND DELIVERY.

4. Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579.

5. Estate of Schedel, 69 Cal. 241, 10 Pac. 334.

6. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442, 33 Pac. 329.

erty," the execution of the same cannot be stayed, unless the undertaking therein specified shall be given. Under this section, a stay bond is necessary to effectuate a stay when the judgment or order appealed from requires the plaintiff in a condemnation proceeding to restore the possession of the premises to the owner,[7] or where it is a judgment foreclosing a lien,[8] provided the appeal is taken by one in possession of the premises or required by the judgment to do some act.[9] It has been held that section 945 of the code requires an undertaking against the commission of waste, and for the value of the use and occupation. But this statute is clearly inapplicable where the property at the time of the judgment and appeal is in the actual possession of the court by its receiver,[10] although it would include a case where a receiver of the rents and profits is appointed in a foreclosure suit and where, notwithstanding the appointment, the mortgagor and his tenant remain in actual possession of the mortgaged premises.[11] Moreover, this section has no application where the premises are in the control of the respondent, or someone other than the appellant. A judgment directing the sale of real property in satisfaction of a purchaser's lien is governed by section 945 where the defendant vendor is in possession. But where the vendee is himself in exclusive possession of the premises, the clauses of the statute requiring an undertaking to secure to him the damages by waste and the value of the use and occupation are inapplicable.[12] So, also, on an appeal from a judgment foreclosing a mechanic's lien by a holder of a subordinate lien not in possession,

7. Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790.

8. Central Lumber & Mill Co. v. Center, 107 Cal. 193, 40 Pac. 334 (rule applicable notwithstanding provisions of Code Civ. Proc., § 1197); Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815. See infra, § 191.

9. See infra, this section.

10. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

11. Bank of Woodland v. Stephens, 137 Cal. 458, 70 Pac. 293.

12. Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71.

the perfection of the appeal by the three hundred dollar undertaking operates as a stay.[13] But, as will be shown later on, when the judgment is for the sale under a mortgage and payment of a deficiency, if a stay is desired, a bond providing for deficiency must be given by all appellants, whether or not they are in possession.[14]

§ 191. Cases Belonging to Two or More Classes.—A judgment may give different kinds of relief or be embraced within two or more of the different classes of judgment mentioned in sections 942 to 945, inclusive, of the Code of Civil Procedure. But this fact does not make the judgment an exception to the rule requiring a stay bond in addition to the three hundred dollar undertaking on appeal to effectuate a supersedeas. For example, a stay bond is required to create a supersedeas pending appeal from a judgment directing a sale of real property under a mortgage,[15] and also pending an appeal from a judgment directing a sale of personal property upon foreclosure of a mortgage thereon.[16] To hold that a judgment directing a sale of real and personal property as an entirety and in one parcel is an exception to the rule requiring a stay bond, and is stayed by a three hundred dollar undertaking on appeal, would be in effect to interpolate a proviso or exception in sections 943 and 945 not warranted either by the language of the code provisions or by any consideration of justice.[17] On the contrary, the appellant in such case is required to give several or all of the undertakings provided for, according to the character of the judgment and the extent of the appeal. This is recognized by the proviso in section 947 of the Code of Civil Procedure that "The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three,

13. Root, Neilson & Co. v. Bryant, 54 Cal. 182.

14. See infra, § 203.

15. See supra, § 190.

16. See supra, § 187.

17. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant." If, then, there be a part or branch of the judgment as to which no undertaking is given, the proceedings upon such part or branch are not stayed.[18]

Judgment on foreclosure.—When a judgment on foreclosure is a dual judgment, one in law in personam for a sum of money and one in equity decreeing the enforcement of the lien, it has been held that inasmuch as the personal judgment might be enforced immediately by execution without regard to the sale, not only must stay bond be given providing against waste and deficiency, but a bond in double the amount of the judgment must also be given.[19] When the judgment is in the form now in common use, that is to say, where the judgment, after reciting the amount due, immediately proceeds to order the property sold, the proceeds applied thereon, and directs the entry of a judgment for a deficiency, if any, there is no judgment which is enforceable by common execution, and a bond in double the amount of the judgment is not required.[20]

§ 192. In Cases not Otherwise Provided for.—Section 949 of the Code of Civil Procedure provides:

"In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon

18. Englund v. Lewis, 25 Cal. 337.

19. Englund v. Lewis, 25 Cal. 337. See MORTGAGES, for treatment of proper judgment to be rendered under the code provisions.

20. Boob v. Hall, 105 Cal. 413, 38 Pac. 977. See, also, Central Lumber & Mill Co. v. Center, 107 Cal. 193, 40 Pac. 334, a mechanic's lien suit in which it was held that a stay bond under section 945 of the Code of Civil Procedure is proper and that a bond under section 942 of the code, in double the amount of the judgment, was without consideration and unenforceable.

the judgment or order appealed from, except where it directs the sale of perishable property''; [and except also in certain other cases specifically mentioned].[1]

This provision establishes the general rule in this state that the perfecting of an appeal under the regular method by the giving of a three hundred dollar undertaking on appeal ipso facto operates as a supersedeas;[2] and this, without an order of court or stay bond.[3] Unlike sections 942 to 945, inclusive, section 949 includes judgments in which the appellant is not required to do anything.[4]

§ 193. Particular Judgments Stayed by Filing of Cost Bond.—Because they are not specified in any of the exceptional classes,[5] the perfecting of an appeal by giving a three hundred dollar undertaking operates as a supersedeas pending an appeal from such as the following judgments or orders: A judgment granting a peremptory writ of mandamus;[6] order issuing a mandatory injunc-

1. See infra, §§ 198, 199, as to cases excepted from this statute; and infra, § 194, as to effect of appeal taken by the alternative method.

2. Whitaker v. Title Ins. & Trust Co., 179 Cal. 111, 175 Pac. 460; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009; City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477; Day v. Gunning, 125 Cal. 527, 58 Pac. 172; Spears v. Modoc County, 101 Cal. 303, 35 Pac. 869; Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617; McMillan v. Hayward, 84 Cal. 85, 24 Pac. 151; Covarrubias v. Board of Supervisors of Santa Barbara County, 52 Cal. 622 (judgment in a proceeding to oust an officer because of malfeasance in office); Cummings v. Cummings, 2 Cal. Unrep. 744, 13 Pac. 322.

3. Born v. Horstmann, 80 Cal. 452, 5 L. R. A. 577, 22 Pac. 169, 338; McGarrahan v. Maxwell, 28 Cal. 75; Cummings v. Cummings, 2 Cal. Unrep. 744, 13 Pac. 322. See infra, § 214, as to stay of proceedings in actions of forcible entry and detainer upon order of court.

4. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075; Born v. Horstmann, 80 Cal. 452, 5 L. R. A. 577, 22 Pac. 169, 338 (interlocutory decree in partition); Estate of Schedel, 69 Cal. 241, 10 Pac. 334 (decree of distribution).

5. See supra, § 187.

6. Palache v. Hunt, 64 Cal. 473, 2 Pac. 245; Ballagh v. Superior Court, 25 Cal. App. 149, 142 Pac. 1123.

tion;[7] an interlocutory decree in partition settling rights of property;[8] an order modifying a divorce decree in respect to the award of the custody of children;[9] a judgment in an election contest declaring a contestee elected;[10] a judgment foreclosing the lien of a purchaser of real property in possession thereof;[11] a judgment dissolving a partnership and directing a sale by a receiver of the partnership property in the possession of the court through its receiver;[12] an order under section 685 of the Code of Civil Procedure granting leave to have execution issued upon a judgment after the lapse of five years;[13] an order refusing to vacate a prior order or judgment;[14] a judgment in an action to determine water rights which confers a right to lay a pipe through the premises of another;[15] an order granting an adjudication of insolvency;[16] and a judgment affirming a survey of a Mexican land grant.[17]

Probate orders.—An appeal without stay bond operates as a supersedeas of an order appointing a guardian;[18] and the same rule applies to an order appointing an executor or administrator.[19] Nor is a stay bond necessary

7. Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563. See infra, § 196.

8. Born v. Horstmann, 80 Cal. 452, 5 L. R. A. 577, 22 Pac. 169, 338.

9. Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956.

10. Chubbuck v. Wilson, 151 Cal. 162, 12 Ann. Cas. 888, 90 Pac. 524; Anderson v. Browning, 140 Cal. 222, 73 Pac. 986; Day v. Gunning, 125 Cal. 527, 58 Pac. 172.

11. See supra, § 190.

12. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

13. See supra, § 188.

14. Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070; Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009. See supra, § 188.

15. Daly v. Ruddell, 129 Cal. 300, 61 Pac. 1080.

16. Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147.

17. McGarrahan v. Maxwell, 28 Cal. 75.

18. Coburn v. Hynes, 161 Cal. 685, 120 Pac. 26; Matter of Moss, 120 Cal. 695, 53 Pac. 357.

19. Estate of Stough, 173 Cal. 638, 161 Pac. 1 (after the perfecting of the appeal and filing of such bond, the executor or administrator has no authority during the pendency of the appeal to take any steps by virtue of his appointment); Estate of Woods, 94 Cal. 566, 29 Pac. 1108.

to create a supersedeas pending an appeal from an order requiring a personal representative to pay a family allowance,[20] or from a decree of distribution.[1]

Eminent domain.—While an appeal by a plaintiff from a judgment of condemnation prior to the expiration of the thirty day period in which he is required to pay the sum assessed has the effect of staying execution on such judgment by the filing of a cost bond,[2] since the amendment to section 1254 of the Code of Civil Procedure in 1903, an appeal by the defendant does not operate as a supersedeas nor preclude the court from making an order letting the plaintiff into possession after payment of the money into court.[3]

§ 194. Stay Where Appeal is Taken Under Alternative Method.—Section 941c of the Code of Civil Procedure, relating to appeals taken by the alternative method, provides:

"Appeals perfected pursuant to the provisions of the foregoing section [section 941b providing for the method of taking such an appeal], shall have the same force and effect as appeals taken pursuant to the provisions of sections nine hundred and thirty-nine, nine hundred and forty and nine hundred and forty-one of this code."

It has been contended that the "taking" of an appeal, under the old method, was accomplished by the filing and service of a notice of appeal, and that the "perfecting" of the appeal by the subsequent giving of an undertaking

20. Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617.

1. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64 (holding that section 942 of the Code of Civil Procedure is inapplicable to a decree of distribution; Firebaugh v. Burbank, 121 Cal. 186, 53 Pac. 560 (pending the appeal, the executor is not only precluded from distributing the estate but is required to retain the property in his care and custody); Estate of Schedel, 69 Cal. 241, 10 Pac. 334.

2. See supra, § 188.

3. County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972. But see City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477, decided prior to the amendment.

is the act which works a stay of proceedings, and that the language of 941c does not carry into appeals by the alternative method the effect of the undertaking which was given to "perfect" an appeal already "taken." But it has been held that this is an unduly narrow interpretation, and that it is not in harmony with the true purpose of the enactments relating to the new method. Under section 940 an appeal is not effectual without the undertaking. Section 941 deals with the subject of security alone. When, therefore, section 941c speaks of appeals taken pursuant to sections 939, 940 and 941, it refers to appeals supported by the necessary undertaking, and imports the force and effect of such appeals into appeals taken by the new method. It follows that the filing of a notice of appeal under the alternative method, in cases where a stay bond is not required by sections 942 to 945, is operative to stay proceedings in the court below, to the same extent as the filing and service of notice followed by the giving of the three hundred dollar undertaking, under the old method.[4] Of course, the mere filing of a notice of appeal does not operate as a stay where the judgment or order is one designated in sections 942 to 945, inclusive, of the Code of Civil Procedure.[5]

What Judgments or Orders may be Stayed.

§ 195. In General.—The code specifically enumerates and authorizes a stay of proceedings on the following judgments or orders: Directing the payment of money;[6] directing the assignment or delivery of documents or personal property;[7] appointing a receiver; directing a sale of personal property upon the foreclosure of a mortgage thereon; directing the execution of a conveyance or other instrument;[8] and directing the sale or delivery of pos-

4. Estate of Stough, 173 Cal. 638, 161 Cal. 1.

5. Bailey v. Superior Court, 31 Cal. App. 78, 159 Pac. 990.

6. See supra, § 188.

7. See supra, § 189.

8. See supra, § 187.

session of real property.[9] With certain specified exceptions,[10] and subject to the limitations hereinafter noted,[11] it authorizes a stay of proceedings upon judgments or orders in cases not otherwise provided for.[12]

The stay of proceedings upon a judgment or order consequent upon an appeal therefrom is limited to the "proceedings" on the judgment for its enforcement, and from its very nature it can operate only upon judgments or orders commanding or permitting some act to be done.[13]

Self-executory judgments.—Where a judgment is self-executing, or has intrinsic effect, there are no proceedings to be stayed, or to be affected by an appeal therefrom.[14] Instances of such judgments are those granting or dissolving an injunction;[15] or determining the status of an individual, as in the case of granting or denying a divorce or annulling a marriage; or quieting title to a tract of land; or setting aside the execution of a deed,[16] or effecting a revocation of the probate of a will.[17] A judgment declaring a person to be elected a director of a corporation and confirming his election is another example of such a judgment. The judgment requires no execution further than its own terms, and consequently on appeal therefrom the appellate court cannot restrain the respondent from doing any act as director, or interfere with his participation in the management of the corporation as director.[18] Adding to the enumera-

9. See supra, § 190.

10. See infra, §§ 198, 199.

11. See infra, this section, as to stay of self-executing judgments.

12. See supra, § 192.

13. Bliss v. Superior Court, 62 Cal. 543; Merced Mining Co. v. Fremont, 7 Cal. 130.

14. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123. And see cases cited infra.

15. See infra, § 196.

16. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123.

17. Estate of Crozier, 65 Cal. 332, 4 Pac. 109 (the order suspends the functions of the appellant as executor and the appeal does not revive them). See Estate of McGinn, 3 Cof. Prob. Dec. 127, holding an undertaking in double the amount of the costs awarded is without consideration, as the order is not a money judgment.

18. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123.

tion of such judgments, it may be noted that an order disbarring an attorney needs no process to execute it, and is unaffected by an appeal or writ of error.[19] Of course, if a judgment has been executed, it cannot be stayed, as there is nothing upon which the stay can operate.[20]

§ 196. Injunctions.—By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitive injunction. Such an injunction requires no execution for its enforcement. It acts directly without process upon the defendant, or, in other words, it is self-executing, and pending an appeal from an order granting such injunction the lower court has full power to punish its violation.[1] Such a rule, in contemplation of law, does not injure the defendant, as he is secured by the undertaking, while if an appeal with an undertaking of three hundred dollars would have the effect of staying the injunction itself, the plaintiff would have no remedy.[2]

It is otherwise in the case of a mandatory injunction. Such an injunction, though couched in terms of prohibi-

19. Tyler v. Presley, 72 Cal. 290, 13 Pac. 856 (pending writ of error the attorney cannot engage in the practice of law).

20. Application of De Lemos, 143 Cal. 313, 76 Pac. 1115. See Rosenholz v. Rosenholz, 160 Cal. 725, 117 Pac. 1048, refusing to pass upon an application for a restitution of the property because of conflicting statements in the record as to whether the application to fix the amount of the undertaking was made before or after judgment executed.

1. Wolf v. Gall, 174 Cal. 140, 162 Pac. 115; United Railroads v. Superior Court, 172 Cal. 80, 155 Pac. 463; Rogers v. Superior Court, 126 Cal. 183, 58 Pac. 452; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333; Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790; Swift v. Shepard, 64 Cal. 423, 1 Pac. 493 (per Sharpstein, J., specially concurring); Heinlen v. Cross, 63 Cal. 44; Merced Min. Co. v. Fremont, 7 Cal. 130.

2. United Railroads v. Superior Court, 172 Cal. 80, 155 Pac. 463; Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790; Merced Mining Co. v. Fremont, 7 Cal. 130. See INJUNCTION.

tion, is suspended and rendered inoperative by an appeal.[3] A proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ, which may be likened to an execution.[4] The object of the rule in both cases is to preserve the status quo pending an appeal.[5]

Injunctions which are incidental.—It has been contended that there is a third class of injunctions which, although prohibitive, are "incidental" to the principal relief and are taken out of the settled rule governing prohibitive injunctions and given the characteristics of a mandatory injunction; but it has been specifically held that there is no support for such distinction either in principle or on authority.[6]

Order dissolving injunction.—The filing of a bond upon an appeal from an order dissolving an injunction cannot have the effect of reviving the injunction.[7] When a process is once discharged and dead, it cannot be revived but by a new exercise of judicial power.[8]

3. Wolf v. Gall, 174 Cal. 140, 162 Pac. 115; United Railroads v. Superior Court, 172 Cal. 80, 155 Pac. 463; Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579; Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436; Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156.

4. Clute v. Superior Court, 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362.

5. Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333.

6. Wolf v. Gall, 174 Cal. 140, 162 Pac. 115 (The argument is rested upon some sentences in Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58, but it was there held that the injunction, though couched in terms of prohibition, was in effect mandatory. Being mandatory, its effect was stayed, and the description of it as "incidental" was unnecessary. The same is true of the remarks in Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436).

7. Southern Pacific Co. v. Smith, 171 Cal. 8, 151 Pac. 426 (holding the appellate court cannot issue a writ of supersedeas in such case); Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Hicks v. Michael, 15 Cal. 107.

8. Hicks v. Michael, 15 Cal. 107.

§ 197. Mandatory and Prohibitory Injunctions Distinguished.—An injunction is purely prohibitory within the rule stated in the preceding section, which merely has the effect of preserving the subject of the litigation in statu quo;[9] while, in general, an injunction is mandatory which compels affirmative action by the defendant,[10] or where, even though restrictive in form, it necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered.[11] Conversely, when an injunction is in its nature prohibitory, it is not transformed and made mandatory within the rule, because it incidentally involves the doing of some affirmative act. The courts will not indulge in any excessive refinements in selecting some minor mandatory feature of the injunction, nor will they hold that any such

9. Wolf v. Gall, 174 Cal. 140, 162 Pac. 115 (a provision in a judgment quieting title to real property enjoining the plaintiff from making any claim thereto is purely prohibitive and must be obeyed notwithstanding an appeal); Clute v. Superior Court, 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362; Bliss v. Superior Court, 62 Cal. 543 (a temporary injunction order restraining a party from commencing or prosecuting actions is not stayed).

10. People v. Laine, 177 Cal. 742, 171 Pac. 941 (that part of a decree under the red-light abatement law which directs the removal of tenants and property and sale of chattels is mandatory and is stayed by operation of an appeal); Clute v. Superior Court, 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362 (an injunction enjoining a manager of a hotel from interfering with or directing its employees is mandatory, as it in effect orders the defendant to surrender possession and management of the hotel property to the plaintiff). See INJUNCTIONS.

11. Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436 (an injunction is mandatory which prohibits a board of education from using a certain text-book and commands the use of another and an appeal stays the operation of the entire injunction. Both branches of the injunction were regarded by the court in this case as mandatory); Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58 (where in an action to contest an election of directors of a corporation an injunction is awarded against interfering with the one declared elected by the judgment in the exercise of his office as director, the injunction, though preventive in form, is in effect mandatory, and is stayed by an appeal, as it requires the other directors to recognize such director); Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156.

minor feature should control the nature of the relief granted.[12]

§ 198. Decree Adjudging Usurpation of Public Office. Section 949 of the Code of Civil Procedure provides that the mere perfecting of an appeal from a judgment does not operate as a supersedeas "where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state."[13] This language is identical with that in section 803 of the code, authorizing the commencement of an action in quo warranto or for usurpation; and it is apparent that it is to the judgment in actions of this character that section 949 has reference. It does not therefore apply to a judgment in an election contest, though the court adds to the judgment an unauthorized declaration that the contestee unlawfully holds the office.[14] Nor does it apply to a judgment removing an officer because of malfeasance in office. It follows that in such cases as these last mentioned, the perfecting of an appeal ipso facto operates as a supersedeas.[15]

§ 199. Orders for Sale of Perishable Property—Motion for Change of Venue.—Section 949 of the Code of Civil Procedure excepts from its operation judgments or orders directing the sale of perishable property.[16] In such case "the court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the appellate court."[17] This provision has reference to a case where the order appealed from direct-

12. United Railroads v. Superior Court, 172 Cal. 80, 155 Pac. 463. See INJUNCTION.

13. Code Civ. Proc., § 949; Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110. See PUBLIC OFFICERS.

14. Day v. Gunning, 125 Cal. 527, 58 Pac. 172.

15. Covarrubias v. Board of Supervisors, 52 Cal. 622.

16. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; Tolle v. Heydenfeldt, 138 Cal. 56, 70 Pac. 1013; Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070.

17. Code Civ. Proc., § 949 (in part).

ing the sale of the property has been made because and upon the ground that the property sold is perishable, and it contemplates an adjudication or a finding to that effect on the part of the court making such order.[18] It is true that in ordinary cases there can be no stay of proceedings upon such an order, and perhaps the determination of the question whether the property ordered sold in any case is perishable is so far within the jurisdiction of the trial court that prohibition will not lie.[19] But in a case where the trial court has ordered the sale of property as perishable, where, clearly, and as a matter of law, it is not of that nature, the appellate court, by virtue of its inherent powers, may grant a supersedeas.[20]

Order on motion for change of venue.—It is expressly provided that an appeal from an order granting or denying a change of venue does not stay the trial in the court below.[1] Hence, a trial court, notwithstanding an appeal from an order refusing to change the place of trial, may proceed with the trial of the cause;[2] and the appellant by appearing and contesting the plaintiff's right to recover does not waive his right to rely on his motion.[3]

Who Need not Give Stay Bonds.

§ 200. **In General.**—Certain persons are excepted by statute from the provisions requiring stay bonds.[4] The code provides as follows:

18. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

19. Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357.

20. See infra, § 216.

1. Code Civ. Proc., § 949.

2. Howell v. Thompson, 70 Cal. 635, 11 Pac. 789; Hibbard v. Chipman, 1 Cal. Unrep. 16. See People v. Whitney, 47 Cal. 584 (holding the trial court has not lost jurisdiction of the case so as to authorize the issuance of a writ of prohibition to prevent it from proceeding with the trial). But see Pierson v. McCahill, 23 Cal. 249, decided under the Practice Act, which contained no express exception.

3. Howell v. Thompson, 70 Cal. 635 11 Pac. 789. See TRIAL.

4. Thornton v. Mahoney, 24 Cal. 569 (holding that the United States need not give a stay bond when

"When an executor, administrator or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal."[5]

And formerly, it was provided that when an assignee had given an official undertaking and appealed from a judgment or order in insolvency, "his official undertaking stands in place of an undertaking on appeal."[6]

Statutes of this character apply only to appeals from judgments and orders made in the specified proceedings.[7] The official bond of the officer is security for the proper distribution of all money or property found to be in his hands by the final judgment settling his accounts. And so, on an appeal from a judgment or order in such proceedings, his official bond has the effect of staying proceedings thereon as effectually as if a new undertaking were given for that purpose. And it has been held that this is true though the judgment or order direct the payment of money.[8]

§ 201. Persons Acting in Another's Right.—Section 946 of the Code of Civil Procedure, so far as it is here pertinent, provides that "the court below may in its discretion dispense with or limit the security required by this

appealing from a decree of a United States district court approving a survey made under an act of Congress of June 14, 1860). See Treadway v. Semple, 28 Cal. 652 (as to appeal from an order of confirmation of a land grant under act of Congress of June 14, 1860, and effect of dismissal of such appeal).

5. Code Civ. Proc., § 963 (in part). See supra, § 140; Ex parte Orford, 102 Cal. 656, 36 Pac. 928.

6. Insolvency Act of 1880. See INSOLVENCY.

7. Ex parte Orford, 102 Cal. 656, 36 Pac. 928; Estate of Danielson, 88 Cal. 480, 26 Pac. 505; Buhlert v. Superior Court, 72 Cal. 97, 13 Pac. 155 (holding the official bond of an assignee in insolvency does not stay proceedings on a judgment against him in an action for the settlement of the affairs of a partnership of which the insolvent is a member).

8. Ex parte Orford, 102 Cal. 656, 36 Pac. 928; In re Sharp, 92 Cal. 577, 28 Pac. 783.

chapter [relating to appeals in general], when the appellant is an executor, administrator, trustee or other person acting in another's right."[9] Whether this provision includes private trustees or not, its obvious purpose is to excuse a stay bond when the court below in its discretion shall so order, where the appellant is a trustee acting under and by virtue of some official authority, whether by appointment of the court or by appointment as an officer of the state. Accordingly, it has been held that a state superintendent of banks, when acting as an officer liquidating the assets of a bank and distributing the same to its creditors, is clearly a trustee. Not only is he a trustee, but he is also a person acting in another's right. The word "trustee" is not limited within the meaning of this section to trustees appointed by and acting under the supervison of some court.[10]

Form and Requisites of Security.

§ 202. Where Judgment Directs Payment of Money.— Section 942 of the Code of Civil Procedure provides:

"If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order;[11] that if the judgment or order appealed from, or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from

9. See supra, § 141.

10. Mercantile Trust Co. v. Miller, 166 Cal. 563, 137 Pac. 913.

11. See infra, § 205.

which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated.[12] When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency."[13]

This is the only section of the code which requires a condition of the undertaking to the effect that judgment against the sureties may be taken on motion.[14]

It has been held, construing an undertaking on appeal under the act upon which section 942 of the Code of Civil Procedure is based,[15] that an undertaking which shows that the principal is about to take an appeal and recites that, whereas, he is desirous of a stay of execution, the stipulators undertake, etc., shows a sufficient consideration for its execution.[16]

12. See Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019 (holding that the motion for judgment against the surety under this section involves only the decision of the question of law, whether or not, upon the record and files in the case, the respondent is entitled to the judgment against the surety, and holding further that the surety is not entitled to a new trial of this proceeding).

13. See JUDGMENTS as to when made payable in a specified kind of money or currency.

14. United States Fidelity & Guar. Co. v. More, 155 Cal. 415, 101 Pac. 302.

15. Practice Act, § 349.

16. Dore v. Covey, 13 Cal. 502.

§ 203. When Judgment Directs Sale or Delivery of Real Property.—It is in the Code of Civil Procedure provided that

"If the judgment or order appealed from, direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."[17]

The Practice Act contained a provision of substantially the same effect.[18]

This section is double, and provides for two distinct undertakings upon two distinct kinds of judgments, one directing a sale of real property, and the other directing the delivery of possession of real property. Where the judgment directs a sale, the undertaking need only provide security against waste,[19] unless such sale is of mortgaged premises and the judgment provides for the payment of a deficiency, in which case it must provide for the payment of such deficiency.[20] In such case, no

17. Code Civ. Proc. § 945; Hoppe v. Hoppe, 99 Cal. 536, 34 Pac. 222 (holding a three hundred dollar undertaking insufficient because it contained no provision against the commission of waste). See supra, § 191, as to necessity of giving an undertaking in double the amount of the judgment.

18. Practice Act, § 352.

19. Englund v. Lewis, 25 Cal. 337.

20. Gutzeit v. Pennie, 97 Cal. 484, 32 Pac. 584 (a clause in the undertaking that it is given in compliance with the provisions of section 945 of the Code of Civil Procedure does not extend its effect

provision need be inserted for the payment of the value of the use and occupation of the premises pending the appeal for the obvious reason that the judgment creditor does not become entitled to the value of such use and occupation until after a sale has been made.[1] When the judgment directs a delivery of possession of real property, the undertaking must provide against waste and for the payment of the value of the use and occupation, and for these two only, for there can be, in such case, no question as to deficiency.[2] Where the sale is directed for the purpose of satisfying any lien other than a mortgage lien, the undertaking need not provide for the payment of any deficiency which the judgment may direct. To this extent, the statute discriminates in favor of mortgages and against other liens.[3]

Who must give undertaking for deficiency.—While at one time the supreme court inclined to the opinion that a deficiency bond was required only of persons in possession of the property ordered sold,[4] in mortgage foreclosure suits it has been specifically held that this section is applicable to every appellant, whether or not he is the mortgagor, or is in possession, or whether or not a deficiency judgment is rendered against him. This holding

beyond the condition for which it is executed, and cure an omission to provide for the deficiency); Spence v. Scott, 95 Cal. 152, 30 Pac. 202; Englund v. Lewis, 25 Cal. 337.

1. Englund v. Lewis, 25 Cal. 337; Whitney v. Allen, 21 Cal. 233. To the same effect, see Boob v. Hall, 105 Cal. 413, 38 Pac. 977 (per Harrison, J., dissenting).

2. Englund v. Lewis, 25 Cal. 337.

3. Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71; Pacific Mutual L. Ins. Co. v. Fisher (Cal.), 35 Pac. 77; Painter v. Painter, 98 Cal. 625, 33 Pac. 483; Englund v. Lewis, 25 Cal. 337; Clemens v. Gregg, 34 Cal. App. 245, 167 Pac. 294.

4. Home Loan Assn. v. Wilkins, 64 Cal. 379, 1 Pac. 348 (in department it was held that the undertaking on appeal by one not in possession need not provide for deficiency. But on a showing that the appellant was in possession, it was held in Bank that an undertaking not providing for deficiency was ineffectual to stay proceedings. The character of undertaking by one not in possession was not discussed in Bank).

is based on the language of the statute which provides that a judgment of foreclosure shall not be stayed unless there be an undertaking "on . . . the part of the appellant . . . to the effect that he will not commit waste."[5]

§ 204. Where Judgment Directs Delivery of Documents or Personalty or Execution of Instruments.—It is provided by the code that

"If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."[6]

The delivery of the documents or property disposed of by the order appealed from to an officer appointed by the court stays the enforcement of the order, the same as where a stay bond is given. Pending such stay, the trial court is not authorized to grant a motion directing such officer to deliver the property to one of the parties.[7]

5. Spence v. Scott, 95 Cal. 152, 30 Pac. 202 ("It is true that in Johnson v. King, 91 Cal. 307, 27 Pac. 644, the appellant was in possession, although he was not the mortgagor, and there was no deficiency judgment against him; but it was held that the provision applies to all appellants. Section 945 of the Code of Civil Procedure is entirely clear upon the subject"); Johnson v. King, 91 Cal. 307, 27 Pac. 644 (holding that the language of the statute clearly applies to a defendant who appeals, whether he be a mortgagor or a party who claims the mortgaged premises and desires to prevent a sale and enjoy the property during the pendency of the appeal); McMillan v. Hayward, 84 Cal. 85, 24 Pac. 151 (an undertaking must be given by a defendant in foreclosure who is residing on the premises but who holds in subordination to another and also such other in subordination to whom the property is held).

6. Code Civ. Proc., § 943 (in part).

7. Oswald v. Sloane, 39 Cal. App. 192, 178 Pac. 312.

In respect to a judgment directing the execution of a conveyance or other instrument, the code provides:

"If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court."[8]

On reversal of the judgment any deed deposited with the clerk under this section of the code becomes a nullity.[9]

§ 205. **Amount — In General.**—When an appeal is taken from a judgment or order directing the payment of money, the stay undertaking must bind the sureties in double the amount named in the judgment or order.[10] It is not necessary that the undertaking cover the amount awarded as costs, as the words "in double the amount named in the judgment" must be taken as referring to the amount adjudged to be due the prevailing party upon the claim involved in the action and for which recovery is awarded, and as not including the incidental recovery on account of the costs of the action awarded only upon claim made and ascertainment of amount had subsequent to the giving of the judgment.[11] When the order ap-

8. Code Civ. Proc., § 944.

9. United States Oil & Land Co. v. Bell, 219 Fed. 785, 135 C. C. A. 455 (case arising in California—citing to the point, Di Nola v. Allison, 143 Cal. 106, 65 L. R. A. 419, 101 Am. St. Rep. 84, 76 Pac. 976).

10. Code Civ. Proc., § 942; Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922; Fox v. Hale & Norcross S. Min. Co., 97 Cal. 353, 32 Pac. 446; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per Thornton, J., on rehearing); Englund v. Lewis, 25 Cal. 337.

11. Whitaker v. Title Ins. & Trust Co., 179 Cal. 111, 175 Pac. 460 (as further indicating the legislative intent that the undertaking need not cover costs on appeals from superior courts, it may be noted that section 978 of the Code of Civil Procedure, relative to undertakings on appeal from justices' courts, expressly requires, as an essential to a stay pending an appeal, security not only for the judgment proper but also for all costs. If the legislature had so intended in case of appeals from

pealed from is in relation to alimony and requires the payment of a specific sum monthly, an undertaking in double the amount the appellant is required to pay in one month is not sufficient.[12] But an undertaking in an amount double the amount of the monthly payments for the period of three years, assumed to be the period during which the appeal will probably be pending, is in accordance with a correct construction of the statute.[13]

§ 206. **Amount Fixed by Court.**—An undertaking to stay execution given pursuant to section 943 of the Code of Civil Procedure is required to be in such amount as is fixed by the trial court,[13a], and this is also the rule under section 945 of the code.[14] It is the official duty of the judge to fix the amount of the undertaking to be given pursuant to these sections, and by refusing to do so, he thereby deprives an appellant of a substantial right which the statute has conferred. He should not refuse to fix the amount of the undertaking on the ground that after the entry of the decree appealed from, some matter has supervened which would deprive the appellant of an effective stay, even though he should give an undertaking. The sufficiency of such matters should be determined when presented upon a direct issue in which the right to the stay of proceedings is involved.[15] In lieu, however, of having the amount of the undertaking fixed

superior courts, it would have been an easy matter so to specify in this case also).

12. Ex parte Cottrell, 59 Cal. 417. See ALIMONY, vol. 1, p. 952.

13. Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per Thornton, J., on rehearing, disapproving the ruling in Church v. Church, No. 9405, heard and determined in department but not reported).

13a. United States Fidelity & Guar. Co. v. More, 155 Cal. 415, 101 Pac. 302.

14. Gordan v. Graham, 153 Cal. 297, 95 Pac. 145 (an appeal from an order refusing to vacate an order for a writ of assistance is in substance an appeal from an order for the delivery of possession of real estate within the statute); Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922.

15. Gutierrez v. Hebbard, 104 Cal. 103, 37 Pac. 749.

by the court, the parties may be permitted to stipulate as to what that amount shall be.[16]

An order fixing the amount of a stay bond may be made ex parte, though it is undoubtedly the safer and better practice to give the respondent an opportunity to be heard.[17] Under section 945 of the Code of Civil Procedure, the trial judge is authorized to fix the amount of the stay bond on appeal from a judgment foreclosing a mortgage on real property, as to all three matters mentioned in the statute, namely, waste, use and occupation, and deficiency;[18] but it is not necessary that the order segregate the amounts.[19]

Modification and review.—When an order fixing the amount of a stay bond has been made and complied with, the appeal is perfected and further proceedings in the court below are stayed. That court has no power thereafter to vacate or modify its order so as to require a bond in a larger amount.[20] Nor can the appellate court review the conclusion of the trial court in this particular or require additional security as a condition to the maintenance of the stay.[1]

Remedy where trial court refuses to act.—If the trial judge improperly refuses to fix the amount of the undertaking to be given to stay proceedings on the judgment

16. Hammond v. United States Fidelity & Guar. Co., 29 Cal. App. 464, 155 Pac. 1023.

17. Hubbard v. University Bank, 120 Cal. 632, 52 Pac. 1070.

18. Hubbard v. University Bank, 120 Cal. 632, 52 Pac. 1070; Ogden v. Davis, 116 Cal. 32, 47 Pac. 772; Boob v. Hall, 105 Cal. 413, 38 Pac. 97 (per Harrison, J., dissenting). But see Gutzeit v. Pennie, 97 Cal. 484, 32 Pac. 584 (which is in effect overruled by Boob v. Hall, 105 Cal. 413, 38 Pac. 977, and which holds the appellant must give an undertaking against waste and to pay deficiency, the former in the amount that may be fixed by the judge, and the latter for the entire deficiency, whatever that amount may prove to be).

19. Wheeler v. Karnes, 130 Cal. 618, 63 Pac. 62; Ogden v. Davis, 116 Cal. 32, 47 Pac. 772. See Boob v. Hall, 105 Cal. 413, 38 Pac. 977, where an order in this form was upheld.

20. Hubbard v. University Bank, 120 Cal. 632, 52 Pac. 1070.

1. Jameson v. Chanslor-Canfield Midway Oil Co., 173 Cal. 612, 160 Pac. 1066.

or order appealed from, the appellate court cannot do so.[2] In such case the appellant's remedy is not by application for a writ of supersedeas,[3] but for a writ of mandate to compel the trial judge to act.[4]

§ 207. Sureties and Affidavit of Justification.—The code requires that all undertakings to stay execution of judgments be entered into on the part of the appellant "by two or more sureties,"[5] except when a surety company, which has complied with all the statutory requirements, is surety, in which case such company "may become and shall be accepted as security, or as sole and sufficient surety upon such undertaking."[6] It has been contended that the quoted words were imperative, and that such a corporation must be accepted as sole and sufficient security regardless of the disparity between the amount of the undertaking and the amount of its assets. To give the statute such an interpretation would defeat its general policy, which is undoubtedly to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals, and it has been specifically held that such contention is not maintainable. Like a natural person, a surety company when justifying must show surplus assets at least equal to the amount of its undertaking.[7]

2. Hinkel v. Crowson, 59 Cal. Dec. 85, 186 Pac. 1042; Doudell v. Shoo, 158 Cal. 50, 109 Pac. 615.

3. Hinkel v. Crowson, 59 Cal. Dec. 85, 186 Pac. 1042.

4. Doudell v. Shoo, 158 Cal. 50, 109 Pac. 615; Gordan v. Graham, 153 Cal. 297, 95 Pac. 145 (distinguishing Rovegno v. Hunt, 83 Cal. 445, 23 Pac. 524); Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083; Gutierrez v. Hebbard, 104 Cal. 103, 37 Pac. 749; Green v. Hebbard, 95 Cal. 39, 30 Pac. 202; Winsor Pottery Wks. v. Superior Court, 13 Cal. App. 360, 109 Pac. 843 (under Code Civ. Proc., § 943). See De Leonis v. York, 140 Cal. 333, 73 Pac. 1058 (holding a petition for writ of mandate to be insufficient which does not show that an appeal has been taken, but merely states that the petitioner is "desirous of appealing from said order").

5. See Code Civ. Proc., § 942; and supra, § 202, for the wording of the code provisions.

6. See Code Civ. Proc., § 1056.

7. Fox v. Hale & Norcross S. Min. Co., 97 Cal. 353, 32 Pac. 446.

Affidavit of justification.—Under section 1057 of the Code of Civil Procedure, the undertaking is required to be accompanied with an affidavit of the sureties (except when the surety is a surety company) that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution. Such affidavit must accompany the undertaking, as the law demands it. And as the statement that the sureties are either householders or freeholders is probably the most material fact demanded by the affidavit, an undertaking without the statement is insufficient as a stay bond. This rule is distinct from that relating to the justification of the sureties. The justification is a thing apart from the bond, while the qualification of the sureties is a material part of the bond.[8] Such an affidavit is not required of a surety company because it cannot in many cases be a resident of the state, or a householder or freeholder in the ordinary sense of the term. Moreover, the insurance commissioner's certificate ordinarily supplies the equivalent of the affidavit in this respect.[9]

§ 208. **Approval, Filing and Delivery.**—An undertaking to stay proceedings on a judgment must be approved by a proper officer, and it has been held that the trial court has power, in a proper case, to set aside the approval, notwithstanding the filing of the transcript in the appellate court.[10]

8. Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741; Maze v. Langford, 16 Cal. App. 747, 117 Pac. 930. See supra, § 160, as to effect of omission upon liability of sureties.

9. Fox v. Hale & Norcross S. Min. Co., 97 Cal. 353, 32 Pac. 446 (The last clause of section 1057 of the Code of Civil Procedure, however, "seems to imply that the undertaking of such a corporation shall be accompanied by an affidavit showing that its liabilities do not exceed its assets computed according to the rule of the statute").

10. Palmer v. Galvin, 2 Cal. Unrep. 446, 6 Pac. 99.

Delivery and filing.—No delivery of the undertaking is necessary; or, at least, the execution of the paper, the delivery of it to the clerk, filing it among the papers with the affidavit of justification and the suspension of proceedings are prima facie a sufficient proof of delivery, if a delivery is essential.[10a] While the three hundred dollar bond on appeal is required to be filed within a limited time after service of notice of appeal,[11] there is nothing in the code which limits the time in which to file a stay bond. Such a bond may be given after the taking of the appeal, and at any time before the execution is satisfied by a sale under it.[12] But an undertaking filed after an execution sale is too late, though filed on the same day.[13]

§ 209. Justification of Sureties.—In respect to the justification of sureties on undertakings on appeal, the code provides as follows:

"The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed."[14]

10a. Dore v. Covey, 13 Cal. 502 (under Practice Act, § 349, being substantially the same as Code Civ. Proc., § 942. See supra, § 202).

11. See supra, § 154.

12. Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60 (the undertaking may be given "at any time before execution of the judgment"); Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Hill v. Finnigan, 54 Cal. 493. See infra, § 212.

13. Craig v. Stansbury, 37 Cal. App. 668, 174 Pac. 404.

14. Code Civ. Proc., § 948 (in part); Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 Pac. 653 (holding there was no such justification in this case as relieved the undertaking from the objection to its sufficiency). See infra, § 211,

A surety company may be required to justify under this section with exactly the same effect as if the undertaking had been executed by natural persons.[15]

The appellant has the full period of twenty days in which the sureties on the original bond or on a new bond may justify, and if the sureties fail to appear for justification in pursuance of one notice, and if there is sufficient time left to produce the same or other sureties upon five days' notice, the appellant may give a new notice of justification and, at the time noticed, may tender a new bond.[16]

Notice of justification.—The code requires five days' notice of justification. This time is not extended by the fact that notice is given by mail, as section 1013 of the Code of Civil Procedure has no application. A notice of justification requires the exceptant to appear at the time specified in the notice, and section 1013 applies only where some act is required to be done or some right exercised within a certain number of days after service, and not to the right to be present at a proceeding at the time specified in the notice. The fact that the notice is to the effect that the sureties on the original bond will justify, does not prevent the appellant from filing a new bond with different sureties.[17]

as to the effect of insufficiency of undertaking.

15. Fox v. Hale & Norcross S. Min. Co., 97 Cal. 353, 32 Pac. 446; Keefe v. Superior Court, 23 Cal. App. 750, 139 Pac. 899. See supra, § 207.

16. Brown v. Rouse, 115 Cal. 619, 47 Pac. 601 (distinguishing Hill v. Finnigan, 54 Cal. 493, and holding the statement therein that the code contemplates but one proceeding in the trial court to stay execution refers to the proceeding in which the appellant is allowed all of twenty days after exception to justify his sureties. When that twenty days have elapsed without justification, then the proceeding is at an end and the right to a stay is lost, so far as the trial court is concerned). See Holt v. James, 10 Cal. App. 360, 101 Pac. 1065, where the trial court made an order requiring the sureties to justify before the expiration of the twenty days, or that execution be issued. Such an order is probably without the jurisdiction of the trial court, but this point was not decided.

17. Brown v. Rouse, 115 Cal. 619, 47 Pac. 601.

Review of decision as to sufficiency.—The statute has provided no mode by which the decision of the officer in favor of the sufficiency of the sureties may be reviewed. And so, where, prior to the amendment of 1905, the statute designated the clerk as one of the officers before whom justification could be had, it was held that his decision on the question could not be reviewed by the appellate court upon an application for a writ of supersedeas;[18] and it was also held that after a justification, under the code, the court has no power to order a second and summary justification.[19]

§ 210. **Construction of Undertaking.**—While the sureties are entitled to stand upon the express terms of their agreement,[20] it is nevertheless true that the language of their agreement is to receive a fair and reasonable interpretation for the purpose of effectuating its objects.[1] In this connection the courts say:

"We are bound to assume that the sureties intended the instrument to be effectual, not nugatory, and if what was intended as the condition may be ascertained from the terms, read in connection with the circumstances under which, and the purposes for which, . . . the bond was executed, it must be sustained. . . . To thus ascertain what the parties intended by the instrument executed is strictly consistent with the rule that a surety is not to be held beyond the contract he has entered into. What contract he has made is to be determined by the same rules of interpretation as are applied to other contracts, the purpose being to ascertain what he has bound himself to do. When that is ascertained his obligation is strictly limited to it."[2]

18. Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383.

19. Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892.

20. See infra, § 633.

1. Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60; Swain v. Graves, 8 Cal. 549; Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731.

2. Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731 (quoting from Longfellow v. McGregor, 56 Minn. 312, 57 N. W. 926). See CONTRACTS; SURETYSHIP.

§ 211. Effect of Insufficiency of Undertaking or Sureties.—When an undertaking filed for the purpose of staying execution fails in substantial respects to comply with the form required by statute, it is wholly ineffectual to stay execution. In such case the respondent has the right to sue out execution at once,[3] even though he may have instituted proceedings for the justification of sureties.[4] And if the sheriff refuses to enforce the writ on the ground that an appeal has been taken, the court may make an order requiring him to proceed.[5] A mere clerical error in the bond, however, does not defeat a stay.[6]

Effect of insufficiency of sureties.—When an appeal is perfected and the proper undertaking executed, the proceedings are stayed in the first instance without regard to the sufficiency of the sureties. It is only necessary that a bond be given at the proper time and that it be in due form.[7] If the sureties are insufficient pecuniarily, the opposite party has his remedy under the code by excepting to them.[8]

3. Chapin v. Broder, 16 Cal. 403 (undertaking insufficient in amount); Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60. See supra, § 207, as to effect of omissions in affidavit of justification.

4. Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60.

5. La Societe Francaise etc. v. McHenry, 49 Cal. 351.

6. Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731 (where a judgment was for one thousand dollars and where the sum stated in the undertaking was "two hundred dollars" and was followed by the recital, "being double the amount named in said judgment," it was held that the amount in the undertaking was obviously a clerical error and should be read "two thousand dollars").

7. Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60 (though the sureties are in fact insufficient, the undertaking operates until the sureties, after exception, have failed to justify, as a stay); Wheeler v. Karnes, 130 Cal. 618, 63 Pac. 62; Sam Yuen v. McMann, 99 Cal. 497, 34 Pac. 80 (notwithstanding the insufficiency of the sureties, the stay bond is equally effective in staying further proceedings and in releasing from levy property levied on under execution); Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

8. Code Civ. Proc., § 948. See supra, § 209.

The stay continues until the expiration of the time allowed for justification,[9] and since the code provides that unless they or other sureties justify as therein provided, the execution is "no longer stayed," it follows that if they or other sureties justify, the stay continues, and that the liability of the old or the new sureties, as the case may be, relates back to the time of the first stay.[10] Of course, the execution is no longer stayed if the sureties fail to justify.[11] The respondent's remedy, then, is not by motion to dismiss the appeal, but by motion in the court below for leave to proceed on the judgment notwithstanding the undertaking.[12] The appellant, on the other hand, may, in such case, file an undertaking to stay execution, at any time before the judgment has been enforced.[13]

New or Additional Undertaking.

§ 212. Where Sureties Fail to Justify or Undertaking is Void.—When an appellant has filed a stay bond sufficient in form, and neither the sureties thereon or other sureties justify within the time limited therefor, on exception taken, the appellant cannot take further proceedings in the court below to effect a stay. Inasmuch as a bond sufficient in form operates as a stay, though the sureties be insufficient, a contrary rule would make it possible for an appellant, by a series of successive bonds executed by insufficient sureties, to obtain all the ben-

9. Wheeler v. Karnes, 130 Cal. 618, 63 Pac. 62 (holding that a foreclosure sale had before the expiration of the time allowed for justification of sureties is invalid, though subsequently the sureties fail to justify and the supersedeas fails).

10. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

11. Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284.

12. Dobbins v. Dollarhide, 15 Cal. 374 (stating the rule under section 349 of the Practice Act, conforming to Code Civ. Proc., § 942).

13. See infra, § 212.

efits of a stay without furnishing to the respondent the security contemplated by the code.[14]

Distinguishable from the case just stated, is that in which the undertaking to stay execution first filed is nugatory and void. Such an undertaking is wholly ineffectual to stay execution, and does not preclude the respondent from enforcing his judgment at once;[15] and since a stay bond may be filed at any time before execution of the judgment,[16] the appellant, without any authorization of the appellate court, may file a second bond sufficient in form at any time before the judgment has been enforced.[17]

§ 213. Where Sureties Become Insufficient or Bond is Lost.—In respect to the subject of this section the code provides as follows:

"When it is made to appear to the satisfaction of the court or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed, the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given."[18]

14. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Hill v. Finnigan, 54 Cal. 493 (the statement in this case that the provisions of code "contemplate but one proceeding to stay the execution below," as noted in Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60, is limited to the facts in the case, and does not apply where the first undertaking is void). See infra, § 218, as to further proceedings in appellate court to procure stay.

15. See supra, § 211.

16. See supra, § 208.

17. Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60.

18. Code Civ. Proc., § 954 (in part).

This statute contemplates that a perfect bond has been prepared and filed in the first instance, and that the imperfections thereto subsequently arose; it contemplates appeals from money judgments, and while it gives the court or judge authority only to order a new bond, it in no way provides for a further or second justification upon the original bond.[18a] Though the section authorizes the court to order a new bond with sufficient sureties "as a condition to the maintenance of the appeal," it is obvious when the nature and purpose of supersedeas bonds are considered that a noncompliance with the order does not necessitate a dismissal of the appeal. The only consequence of a failure to keep the stay bond good is that execution may issue.[19]

III. Upon Allowance by Court or Judge.

§ 214. On Order of Trial Court—Control of Right Generally.—Whether a stay shall be ordered in a particular case is a matter as to which the trial court exercises large discretionary powers;[20] and its determination will not be disturbed by the appellate court, unless an abuse of discretion is made to appear.[1] If the trial court should direct a stay on condition that an undertaking be executed within a specified time, the stay falls if the undertaking is not given in that time.[2] But when the direction is given and a sufficient undertaking is executed pursuant thereto, the proceedings are stayed precisely as in other cases. The court has no further control over the matter and cannot, without statutory authority, withdraw

18a. Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892.

19. Mersfelder v. Spring, 136 Cal. 619, 69 Pac. 251.

20. Gross v. Kelleher, 73 Cal. 639, 15 Pac. 362; Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014.

1. Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014 (holding that the action of the trial court cannot be reviewed on an application for a writ of supersedeas).

2. Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048.

its direction or discharge such order.[3] However, it may set aside its order if the sureties on the undertaking required by the court fail to justify when excepted to.[4]

In actions of forcible entry, etc.—With reference to a stay of proceedings in actions of forcible entry and unlawful detainer, the code provides that an appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs.[5] The power to grant a stay under the provisions of this section rests exclusively in the court that tried the case. And when an application for a stay has been denied by the trial judge, the appellate court has no power to accept an undertaking and direct a stay of proceedings.[6]

§ 215. On Order or Writ of Appellate Court—In General.—The power to issue a writ of supersedeas is one of the powers incidental to a court of last resort.[7] If, after the creation of a statutory supersedeas, by the execution of the undertaking required by the code, the court below seeks to enforce its judgment, the court to which an appeal is taken will grant a special order or writ of supersedeas re-

3. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

4. Gross v. Kelleher, 73 Cal. 639, 15 Pac. 362.

5. Code Civ. Proc., § 1176; Sarthou v. Reese, 151 Cal. 96, 90 Pac. 187 (the filing of a cross-bill claiming affirmative relief upon equitable grounds does not change the character of the action so that supersedeas is a matter of right, when the defendant is denied the relief sought); Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922; Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048; Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594; Kaiser v. Hancock, 25 Cal. App. 323, 143 Pac. 614.

6. Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922; Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048; McDonald v. Hanlon, 71 Cal. 535, 12 Pac. 515.

7. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Williams v. Borgwardt, 115 Cal. 617, 47 Pac. 594; Craig v. Stansbury, 37 Cal. App. 668, 174 Pac. 404. See Bryan v. Superior Court, 169 Cal. 761, 147 Pac. 938, where it was held that, admitting the inherent power of the court, a proper showing was not made for the issuance of the writ.

straining action by the trial court. It is in cases of this character that writs of supersedeas are issued most frequently.[8]

Nature and scope of remedy.—The remedy is generally regarded as injunctive or prohibitive in character to prevent the taking of some step toward the enforcement of the judgment which has been threatened.[9] But it is corrective in nature also; and the court has even gone so far, upon the granting of a writ of supersedeas, as to quash writs already issued out of the superior court, to vacate sales already made in pursuance of the order of that court,[10] and to direct a return of the money obtained with interest.[11] This power exists also when the statute makes no provision for a stay in a particular case and the writ is necessary to preserve the rights of the par-

8. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696; Clute v. Superior Court, 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362; Madera County v. Raymond Granite Co., 138 Cal. 244, 71 Pac. 112; Craig v. Stansbury, 37 Cal. App. 668, 174 Pac. 404.

See, also, the following cases in which the writ was granted or denied without passing upon or discussing it as a remedy: Whitaker v. Title Ins. & Trust Co., 179 Cal. 111, 175 Pac. 460; Doudell v. Shoo, 159 Cal. 448, 114 Pac. 579 (denying writ); Rohrbacker v. Superior Court, 144 Cal. 631, 78 Pac. 22; City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477; Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71; Brown v. Rouse, 115 Cal. 619, 47 Pac. 601; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Colusa & H. R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 Pac. 1011. See infra, § 227.

9. Craig v. Stansbury, 37 Cal. App. 668, 174 Pac. 404.

10. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020; Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71; Holcomb v. Juster, 39 Cal. App. 462, 179 Pac. 445. But see Craig v. Stansbury, 37 Cal. App. 668, 174 Pac. 404 (holding that the appellate court will not by supersedeas vacate a sale already had, where the ground of relief is not the enforcement of a stay already obtained but the creation of a stay in cases not provided for in the statute). See infra, § 220, as to nature of proceeding to obtain writ of supersedeas.

11. Romine v. Cralle, 83 Cal. 432, 23 Pac. 525; Holcomb v. Juster, 39 Cal. App. 462, 179 Pac. 445.

ties,[12] and where the sureties fail to justify in the trial court.[13]

§ 216. In Cases not Provided for by Statute.—The power of an appellate court to issue a writ of supersedeas exists in cases where the statute regulating a stay of proceedings on appeal makes no provision for such stay in the particular case, but where the writ is necessary to preserve the status quo, so that rights involved in an appeal when determined by the appellate court may not be lost or prejudiced by reason of the intervening execution of the judgment or order appealed from. Hence, it is a general rule, that when the law makes no provision for a stay, the appellate court should grant a supersedeas whenever it is reasonably necessary to protect the appellant from serious injury in case of a reversal.[14] Thus, while it is true in ordinary cases that there can be no stay of proceedings on an order directing a sale of perishable property,[15] if it appears that the court below has ordered a sale of property as perishable which clearly and as a matter of law is not of that nature, or if, as a matter of fact, it is extremely doubtful if it is perishable within the meaning of the code provision, the appellate court, by virtue of its inherent powers, has undoubted power to order a stay of proceedings pending an appeal, upon such terms and such security as it may deem proper.[16] So, also, where, in an action to contest the rights of conflicting claims to money in the possession of a neutral depositary, a judgment is given for one claimant against the depositary, and it appears that such claimant has no means and that if he collects the money

12. See infra, § 216.

13. See infra, § 218.

14. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075; Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009; Colusa & H. R. R. Co. v. Superior Court, 31 Cal. App. 746, 161 Pac. 1011.

15. See supra, § 199.

16. Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357 (where a sale of rolling stock, real property and franchise of a railroad company was ordered).

the other will not be able to recover it if he should prevail on his appeal from the judgment, the court will grant a supersedeas to preserve the status quo, on the execution of a bond to secure the respondent the fruits of his judgment in case the judgment should be affirmed or the appeal dismissed.[17]

§ 217. In Injunction Cases.—The statutory law gives no stay of proceedings upon a prohibitory injunction.[18] In consequence, it is an open question in this state whether the appellate courts have power to stay the force of an injunction on the ground that it is necessary or proper to the complete exercise of its appellate jurisdiction. Assuming jurisdiction to exist, that court will not, in a proceeding for such a stay, review the correctness of the lower court's determination that an injunction was essential or proper. The appellate court must, however, consider the rights of the respondent as well as of the appellant, and contemplate the possibility of an affirmance as well as a reversal. If, therefore, a stay can be granted only at the risk of destroying rights which will belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction.[19] On an appeal from an order dissolving an injunction, it has been held that an appellate court has no power to issue an order staying proceedings in an action on the injunction bond.[20]

§ 218. When Sureties Fail to Justify.—Although, after a failure of sureties to justify, an appellant cannot take

17. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075.

18. See supra, § 196.

19. Hurlbert v. California-Portland Cement Co., 161 Cal. 239, 38 L. R. A. (N. S.) 436, 118 Pac. 928 (per Sloss, J., Angellotti, J., and Shaw, J., specially concurring. The main opinion of Melvin, J., concurred in by Lorigan, J., was based upon the doctrine of balancing injuries).

20. Adams v. Andross, 77 Cal. 483, 20 Pac. 26. See INJUNCTION.

further proceedings in the court below to effect a stay,[1] he may, upon a proper showing of accident, surprise, inadvertence or excusable neglect, make his application in the appellate court and be allowed to file an undertaking in that court.[2] As a rule, appellants desiring to take this course must have made a bona fide attempt to give a stay bond in the court below.[3] Such orders have not been made and ought not to be made in the absence of any excuse for the failure to give the undertaking or to justify the sureties in the manner and at the time prescribed and intended by the statute.[4]

§ 219. Against Whom Proceedings may be Brought.— A writ of supersedeas is directed to the court whose action is sought to be restrained, or to some one of its officers; and it is limited to restraining any action upon the judgment appealed from. It cannot be directed to the parties to the action and used to perform the functions of an injunction against them, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment.[5] And it cannot be em-

1. See supra, § 212.

2. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Williams v. Borgwardt, 115 Cal. 617, 47 Pac. 594; Mansfield v. Stern (Cal.), 4 Pac. 777; Hill v. Finnigan, 54 Cal. 493; McClatchy v. Sperry, 6 Cal. Unrep. 345, 58 Pac. 529 (where, although the excuse for failure to justify was hardly sufficient, a stay was ordered, the respondent not objecting, provided he was secured by a proper bond).

3. Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 Pac. 653.

4. Williams v. Borgwardt, 115 Cal. 617, 47 Pac. 594 (holding that the mere fact that the sureties were absent from the county is not a sufficient excuse for their failure to justify where it is not shown that they were notified or requested to attend, or that they were absent without the consent of the appellant, or that any effort was made to secure their attendance or to substitute other sureties).

5. Madera County v. Raymond Granite Co., 138 Cal. 244, 71 Pac. 112 (overruling City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477, in so far as it authorizes the granting of an injunction against the parties); Rose v. Mesmer, 131 Cal. 631, 63 Pac. 1010 (the court has no jurisdiction to issue an original injunction to restrain the

ployed for any purpose as to persons not parties to the judgment.[6] However, the writ may be directed to an officer of the court, whose every act must depend for its authority upon the order appointing him, and so it has been held that the writ may be directed to a guardian.[7] The question as to whether an appellate court can issue its supersedeas to a lower court that is a stranger to the appeal has been presented in a recent case, but, owing to the fact that the orders complained of had been vacated, was not decided therein.[8]

§ 220. **Proceedings to Obtain Writ of Supersedeas.**—Under the California practice, in the rare cases where a writ of supersedeas is issuable, it must be obtained, where cause exists and upon proper terms by a motion or application,[9] made by the appellant,[10] to the court in which the appeal is pending.[11] The application is a proceeding in the original action, in aid of appellate jurisdiction. Hence, it should bear the title of the cause on appeal, the same as any other motion made in that cause,[12] and be entered on the register of actions in the court of review as a motion in the cause on appeal and under the same number.[13] But any error in entitling the proceed-

commission of a trespass); Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123.

6. Madera County v. Raymond Granite Co., 138 Cal. 244, 71 Pac. 112; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123.

7. Coburn v. Hynes, 161 Cal. 685, 120 Pac. 26.

8. Bundy v. Barnes, 31 Cal. App. Dec. 330, 188 Pac. 610.

9. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

10. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020 (a person who is not a party to the action cannot move for a supersedeas).

11. Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Armstrong v. Sacramento Valley Realty Co., 30 Cal. App. Dec. 339, 185 Pac. 874 (an application made to another court will be dismissed without a discussion of its merits).

12. Flores v. Superior Court, 167 Cal. 794, 139 Pac. 73; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696 (proceeding should not be entitled petitioner against the superior court or judge).

13. Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

ing as an independent action will be corrected by the appellate court.[14] The merits of an appeal will not be discussed on an application for a writ of supersedeas.[15]

Time of application.—An application for a writ of supersedeas can be made only while an appeal is pending, but it should not be made until steps to enforce the judgment or order appealed from have been initiated or threatened.[16] No power in the appellate court to grant a supersedeas remains after the determination or dismissal of an appeal, and any steps looking to a stay of execution thereafter must be sought in the trial court.[17] If the order complained of has been vacated before the hearing of an application for the writ, the petition will be dismissed.[18]

Security.—When the appellate court, by virtue of its inherent powers, grants a supersedeas in a case not covered by the statute, it may require the appellant to give an undertaking or bond to secure the respondent the fruits of his judgment in the event of an affirmance thereof, or a dismissal of the appeal.[19] But when the supersedeas is granted in a case covered by statute, either in the case where the legislature has provided for a stay upon security in an amount fixed by a judge of the lower court, or upon the three hundred dollar undertaking, the appellate court is without authority to require additional security.[20]

14. Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

15. City of Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477.

On an application for an order directing a stay of proceedings, the court will not consider the question whether the appellant is aggrieved by the order appealed from and has a right to appeal, as this question goes to the merits of the appeal. In re Sharp, 92 Cal. 577, 28 Pac. 783.

16. Dorn v. Crank, 96 Cal. 381, 31 Pac. 528 (denying supersedeas to stay the issuance of receiver's certificates because the application was premature).

17. Bond v. United Railroads, 169 Cal. 618, 147 Pac. 465.

18. Bundy v. Barnes, 31 Cal. App. 330, 188 Pac. 610.

19. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075.

20. Jameson v. Chanslor-Canfield Midway Oil Co., 173 Cal. 612, 160

IV. SCOPE, EFFECT AND DURATION.

§ 221. In General.—As to the effect of a supersedeas, the code provides:

"Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; provided, however, said property shall not be released from the levy, if the respondent excepts to the sufficiency of the sureties within five days after the giving of the undertaking staying execution until such sureties, or others, justify in the manner prescribed by law; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from."[1]

This section relates to the perfection of an appeal by giving the undertaking mentioned in section 941 of the code in those cases in which such undertaking is sufficient to create a supersedeas, and also to the undertakings mentioned in sections 942, 943 and 945. In each case the giving of the required undertaking creates a statutory supersedeas.[2] Since the stay is limited by the terms of the statute to "proceedings in the court below" upon the judgment, it does not authorize an appellate court to restrain the respondent from enforcing his judgment in person and without the aid of the court.[3]

Prospective effect.—A stay of proceedings pending an appeal has no retrospective operation, and does not undo or render nugatory or unlawful any action that has already been had before the supersedeas became effective.[4]

Pac. 1066. See supra, §§ 212, 213, as to new or additional undertakings.

1. Code Civ. Proc., § 946 (in part).

2. See supra, §§ 187, 188.

3. See supra, § 219.

4. Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826.

While a trial court has no power to enforce an order awarding cus-

On the contrary, it is prospective in its operation, and has the legitimate effect of keeping the proceedings in the condition they were when the stay of proceedings was granted. It operates to prevent any future change in the condition of the parties.[5] It is not correct to say that a judgment or matters embraced in a judgment are stayed, and the statute does not say so. The statute declares that it is proceedings upon the judgment and the matters embraced therein that are stayed, that is, the execution—the enforcement—of the judgment is suspended.[6] A statutory supersedeas then precludes the doing of any act for the purpose of carrying the judgment or order into effect.[7] It suspends the power of the

tody of a child pending an appeal therefrom (Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956), if the parties have complied with the decree, a subsequent appeal with supersedeas is ineffectual as affecting the custody of the child and does not entitle the appellant to its return pending the appeal. Application of De Lemos, 143 Cal. 313, 76 Pac. 1115 (in this case the order was executed before any appeal and the superior court had done nothing in the premises since).

5. Application of De Lemos, 143 Cal. 313, 76 Pac. 1115; Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Merced Mining Co. v. Fremont, 7 Cal. 130; In re Dupes, 31 Cal. App. 698, 161 Pac. 276. See Wilson v. Fisher, 148 Cal. 13, 82 Pac. 421 (holding that in the absence of an express statutory provision to the contrary, an appeal operates at most to preserve the status existing at the time of the appeal).

The ordinary effect of an appeal from a judgment when proceedings therein are stayed is to preserve the rights of the parties to a controversy in the same condition as they were prior to the entry of judgment, and to prevent the appellant from being prejudiced by its enforcement; People v. Bank of San Luis Obispo, 159 Cal. 65, 77 Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866; Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58; Spears v. County of Modoc, 101 Cal. 303, 35 Pac. 869; State Inv. & Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786.

6. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207.

7. Karry v. Superior Court, 162 Cal. 281, 122 Pac. 475, 128 Pac. 760; State Inv. & Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; McGarrahan v. Maxwell, 28 Cal. 75; In re Dupes, 31 Cal. App. 698, 161 Pac. 276; Sharon v. Hill,

court below to issue an execution on the judgment or order appealed from,[8] or, if a writ of execution is issued, prohibits the execution of the writ.[9] It also prevents the trial court from enforcing the judgment or order by contempt proceedings,[10] or through the appointment of a receiver,[11] or by other means.[12]

In ejectment.—In an ejectment suit, a stay bond given by the defendant on appeal from a judgment against him deprives the plaintiff of all right to any possession of the land until the determination of the appeal. It operates to give the defendant a lease of the land during that period in consideration of the obligations in his undertaking.[13]

Termination of stay.—The supersedeas terminates when the appellate court loses jurisdiction of the appeal, that is to say, when the remittitur is filed in the office of the clerk of the superior court.[14]

26 Fed. 337, 11 Sawy. 290 (citing Cal. Code Civ. Proc., § 946).

8. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020; Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123.

9. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123, quoting Hovey v. McDonald, 109 U. S. 150, 27 L. Ed. 888, 3 Sup. Ct. Rep. 136, see, also, Rose's U. S. Notes. See infra, § 223.

10. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020 (an appeal from an order directing the payment of alimony); Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58; Ex parte Orford, 102 Cal. 656, 36 Pac. 928; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563; Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35; Ballagh v. Superior Court, 25 Cal. App. 149, 142 Pac. 1123.

11. See infra, § 226.

12. An appeal by an executor from an order directing the sale of property suspends the operation of the order, and a subsequent order removing the executor for disobedience is illegal; Estate of Loyd, 175 Cal. 699, 167 Pac. 157.

13. Shepperd v. Tyler, 92 Cal. 552, 28 Pac. 601 (holding that since the stay bond operates as a lease, the agreement to pay the value of the use and occupation, as in the case of any other lease, is the personal obligation of the appellant, and upon his death survives against his estate, to be collected as any other claim against it; and further holding that the remedy in such case is against the estate, or from the sureties on the undertaking, and not against the personal representative personally).

14. Granger v. Sheriff, 140 Cal.

§ 222. As to Parties. While it seems that a supersedeas bond executed by one of several appellants is ordinarily effectual only as to the party giving the bond, the stay will extend to the whole of the judgment if an enforcement of any part will injuriously affect his rights. For example, where, in a claim and delivery suit, judgment is rendered against all of several defendants, and one appeals, the supersedeas thereon stays all proceedings on the judgment where the rights of the defendants are joint. In such case the right of the appellant extends to every article in controversy, and a levy upon any of them would disturb his possession at least in part.[15]

The stay given by section 949 of the Code of Civil Procedure is effectual as to a judgment so far only as it affects the appellant and requires him to do something, or permits something to be done as to him. Accordingly, in an interpleader suit in which a judgment is rendered in favor of the individual defendant against the defendant in possession of the fund, an appeal by the plaintiff does not stay the enforcement of the judgment by the individual defendant against his codefendant.[16]

§ 223. Effect on Judgment, Lien, and Levy.—A statutory supersedeas does not destroy or impair the character of the judgment itself. It does not reverse, suspend or supersede the force of the judgment; that remains in all respects the same.[17] Herein should be ob-

190, 73 Pac. 816. See infra, § 619, as to effect of issuance of remittitur.

Any stay consequent upon a writ of error from the supreme court of the United States falls with the dismissal of the writ and the filing of the mandate thereon, without a specific order vacating the stay. Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572.

15. Eastern Outfitting Co. v. Superior Court, 38 Cal. App. 374, 176 Pac. 366.

16. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075.

17. Rogers v. Superior Court, 126 Cal. 183, 58 Pac. 452; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123; Walls v. Palmer, 64 Ind. 493; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156

served the distinction between the effect of an appeal from a judgment in staying further proceedings thereon, and its effect in depriving the judgment itself of any efficacy as evidence of the fact determined. The appeal suspends the force of the judgment as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character.[18] A stay of execution does not operate to suspend the running of interest on the judgment or preclude a tender by the defendant for the purpose of stopping interest thereon.[19]

Effect on lien.—While a supersedeas, does not, in the absence of a statute, impair the lien of a judgment,[20] it is now provided by the code that the lien of a judgment continues for five years from the time the judgment is docketed, "unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient under-

(citing Bullion etc. Min. Co. v. Eureka Hill Min. Co., 5 Utah, 151, 13 Pac. 174, to the effect that the taking of an appeal and the giving of a supersedeas bond do not make void, or nullify or suspend, the judgment or an injunction contained therein). See Estate of Piercy, 168 Cal. 750, 145 Pac. 88, holding that in an action against an administrator in his individual capacity, the giving of a stay bond does not extend the scope of the judgment appealed from as an adjudication against him in his representative capacity. See supra, § 196, as to effect of supersedeas upon an injunction.

18. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123. See supra, § 177.

19. Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308.

20. See Low v. Adams, 6 Cal. 277 (decided prior to the enactment of Code Civ. Proc., § 671, in 1873–74). The time, however, during which the proceedings are stayed must be excluded from the computation of the time during which the judgment remains a lien; Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193; Englund v. Lewis, 25 Cal. 337; Chapin v. Broder, 16 Cal. 403 (holding that an undertaking insufficient in amount does not have this effect); Dewey v. Latson, 6 Cal. 130.

It has been held that any period of time which may transpire between the docketing of the judgment and the stay of proceedings is to be included in the computation of the time during which the judgment remains a lien. Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193.

taking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases."[1] Under our law, therefore, the lien of the judgment is destroyed by the filing of a proper stay bond.[2] And so it has been held that an owner of land may convey it pending appeal, provided he does not do so with an intent to defraud creditors.[3]

Effect on levy.—While ordinarily a supersedeas is not retroactive in nature, and in the absence of a contrary statute does not release a levy of execution,[4] it is now specifically provided in this state that the effect of a supersedeas is to release "from levy property which has been levied upon under execution issued upon such judgment."[5] Under this statute it is the duty of the sheriff to release all property from levy under writ of execution immediately upon notice to him of the perfection of the appeal, and the giving of the bond to stay execution, and this without regard to the sufficiency of the sureties.[6]

If the judgment has been executed, there is no further proceeding to be taken in the court below, and, consequently, there is nothing upon which the supersedeas can act.[7]

§ 224. Effect upon Attachment.—In respect to the effect of an appeal upon an attachment the code provides:

1. Code Civ. Proc., § 671 (in part). See JUDGMENTS.

2. Fox v. Hale & Norcross S. Min. Co., 97 Cal. 353, 32 Pac. 446; Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731.

3. Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731.

4. See supra, § 221. And see Ewing v. Jacobs, 49 Cal. 72 (decided under the law prior to 1874). See generally, LEVY AND SEIZURE.

5. See Code Civ. Proc., § 946.

6. Sam Yuen v. McMann, 99 Cal. 497, 34 Pac. 80 (holding that the sheriff cannot retain possession until the sureties have justified, or until their justification has been waived).

7. Hoppe v. Hoppe, 99 Cal. 536, 34 Pac. 222.

"An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after the entry of the order appealed from, such appeal be perfected."[8]

This statute refers to orders dissolving attachment and to judgments for the defendant in attachment suits. While section 553 of the Code of Civil Procedure provides that a judgment for the defendant dissolves an attachment, this section is to be construed in connection with section 946 just quoted. Thus construed, the dissolvent force of a judgment for the defendant is neutralized by a perfected appeal, provided the additional undertaking is filed and the appeal perfected within the specified time.[9]

While an appellant has sixty days in which to appeal, he must, if he wishes to preserve the lien of the attachment, perfect his appeal within five days of the entry of the order appealed from. It is optional with him as to whether or not steps be taken to preserve the lien.[10]

Bond to prevent levy.—A bond given to the sheriff pursuant to section 540 of the Code of Civil Procedure to prevent the levy of an attachment is not within the terms of section 671 providing for the cessation of the lien of the judgment if a supersedeas is had. And the bond is not destroyed or affected by the giving of a supersedeas

8. Code Civ. Proc., § 946 (in part); Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95 (holding the lien of the attachment is not preserved if the undertaking is not for double the amount claimed).

9. Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786. See Aigeltinger v. Whelan, 133 Cal. 110, 65 Pac. 125 (holding a judgment for defendant ipso facto dissolves an attachment, but no question as to the effect of section 946 arose).

10. Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95.

bond to stay the enforcement of a judgment for the plaintiff.[11]

§ 225. Effect on Proceedings not Embraced in Order or Judgment.—Under the provision of the code that "the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from,"[12] an appeal can operate as a stay of proceedings only upon the specific judgment or order appealed from,[13] that is to say, such proceedings as may be instituted by the respondent for the purpose of enforcing the provisions of the judgment or order.[14] It cannot affect other proceedings in the cause, or deprive the trial court of power to proceed upon any matter in an action not affected by the order appealed from.[15]

Applications of rule.—Except under the former practice, when an appeal from an order denying a new trial was regarded as an indirect appeal from the judgment, and stayed proceedings upon the judgment,[16] proceed-

11. Ayres v. Burr, 132 Cal. 125, 64 Pac. 120 (holding that the sheriff, having custody of such bond, is justified in refusing to execute a second writ of attachment placed in his hands). See supra, § 223, for wording of Code Civ. Proc., § 671, in this connection. See ATTACHMENT.

12. See Code Civ. Proc., § 946. See supra, § 180.

13. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Taylor v. Superior Court, 30 Cal. App. Dec. 349, 185 Pac. 994.

14. Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207. See supra, § 221.

15. Estate of Crozier, 65 Cal. 332, 4 Pac. 109 (holding that a stay consequent upon an appeal from an order revoking the probate of a will does not prevent the appointment of a special administrator, as this is not a proceeding upon the order); Bliss v. Superior Court, 62 Cal. 543 (holding that an undertaking on appeal from an order refusing to dissolve a temporary injunction does not prevent a trial court from proceeding with the rest of the case). See cases cited infra.

16. Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009; Starr v. Kreuzberger, 131 Cal. 41, 63 Pac. 134 (holding that the rule applied both to cases where there has been no appeal from the judgment and to cases where an appeal was taken therefrom but was dismissed); Baldwin v. Superior Court, 125 Cal. 584, 58 Pac. 185; Holland v. McDade, 125 Cal. 353, 58 Pac. 9 (where the judgment directs the payment

ings on a judgment are not stayed by an appeal from an order made after judgment and by the filing of a bond thereon.[17] Hence, proceedings to enforce the judgment or order itself are not affected by an appeal from an order refusing to vacate such judgment or order;[18] or from an order setting aside an entry of satisfaction of the judgment;[19] or from an order granting leave that a judgment be enforced after the lapse of five years or refusing to vacate such order;[20] or from an order denying a motion to recall an execution on a money judgment.[1]

Conversely, a stay bond executed on appeal from a judgment does not affect any proceeding on a motion for new trial, as such motion is not in a direct line of the judgment, but is independent of it and collateral thereto.[2] Neither does a stay of proceedings upon a judgment pre-

of money, the appellant on appeal from an order denying a new trial may give a bond in double the amount of the judgment and thereby stay its execution); Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71; Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 106; McCallion v. Hibernia Sav. & Loan Soc., 83 Cal. 571, 23 Pac. 798; Fulton v. Hanna, 40 Cal. 278.

Orders denying new trial are not now directly appealable. See supra, § 34.

17. Carit v. Williams, 67 Cal. 580, 8 Pac. 93. And see cases cited infra.

18. Bryan v. Superior Court, 169 Cal. 761, 147 Pac. 938; Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 Pac. 838; Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009. But see Green v. Hebbard, 95 Cal. 39, 30 Pac. 202, where the court apparently treated the appeal from the order refusing to vacate, in effect, as an appeal from the original and as subject to the same provisions of the statute as to the stay bond required. Referring to this case, the court, in Credits Commutation Co. v. Superior Court, 140 Cal. 82, 84, 73 Pac. 1009, said that the decision would have been more satisfactory if the court had granted relief by virtue of its inherent power to preserve to a party the fruits of his appeal.

19. Taylor v. Superior Court, 30 Cal. App. Dec. 349, 185 Pac. 994 (holding that the party may have a remedy by application to the trial court for a stay of proceedings, or, if the application is denied, he may perhaps bring an appropriate action to enjoin the execution of the judgment).

20. Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070.

1. Carit v. Williams, 67 Cal. 580, 8 Pac. 93.

2. Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Rayner v. Jones, 90 Cal. 78, 27 Pac. 24.

clude the trial court from discharging an ancillary receiver,[3] or from making such orders as are necessary for preserving the property involved in the action, or enforcing a continuance of the status quo.[4] It seems that the trial court may compel the sheriff to observe the stay of execution given by statute.[5]

§ 226. Effect upon Receiverships.—The filing of the undertaking on an appeal from an order appointing a receiver operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores such right to the appealing party from whom it had been taken. But on such appeal, the supersedeas does not undo or reverse the order appointing the receiver. Neither does it render nugatory any action already taken by him under the order and before the appeal was taken and bond duly filed, or make such action unlawful. The rights and powers of the receiver being suspended, it is his duty, on being notified thereof by proper process, to restore that which had come into his hands to the parties from whom it had been taken and withheld.[6] While an appeal in such case terminates the right of the lower court and its officers from acting fur-

3. See infra, § 226.

4. Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156; Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147 (pending an appeal from an adjudication of insolvency, the court may preserve the property of the alleged insolvent. This may be accomplished through its receiver, whose functions are not suspended).

5. Mannix v. Superior Court, 157 Cal. 730, 109 Pac. 264 (where the power of the trial court was "admitted for the purposes of this case").

6. Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826 (stating the rules generally, citing authorities thereto, and explaining Los Angeles City Water Co. v. Superior Court, 124 Cal. 385, 57 Pac. 216). See the following cases cited in Jacobs v. Superior Court, supra: State v. Johnson, 13 Fla. 33; Buckley v. George, 71 Miss. 580, 15 South. 46; Farmers' Nat. Bank v. Backus, 63 Minn. 115, 65 N. W. 255 (distinguishing Matter of Real Estate Associates, 58 Cal. 356. But see comment on this case, infra, under "Ancillary Receivership"). And see RECEIVERS.

ther under the order appealed from, it does not, however, suspend the functions of a merely ancillary receivership, or deprive the trial court of authority over the receiver in respect to matters not involved on the appeal.[7]

Ancillary receivership.—Upon an appeal from a judgment the functions of an ancillary receiver are not necessarily suspended during the appeal;[8] neither is the power of the court to remove or suspend him superseded by the appeal.[9] But a supersedeas consequent upon an appeal necessarily deprives a trial court of power to appoint a receiver after judgment for the purpose of carrying the judgment into effect, as this is a proceeding upon the judgment.[10] For example, pending an appeal from a judgment dissolving a corporation and directing that its affairs be wound up and its effects distributed under the control of the court, the trial court is without authority to appoint a receiver of the effects of the corporation during the pendency of the appeal.[11] So, also, where a receiver is appointed to sell mortgaged prem-

7. See cases cited infra.

8. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Matter of Real Estate Associates, 58 Cal. 356 (the functions of a receiver are not suspended during an appeal from an order adjudicating one to be insolvent).

9. Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207 (distinguished in Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, where the court says it sees no resemblance between the case where the receiver is appointed before judgment to preserve the property pending the litigation and one in which he is appointed afterwards to dispose of the property in order to make the judgment effective. The power of the court is stayed in the latter case).

10. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020 (the stay of proceedings on an alimony order deprived the trial court of authority to enforce it through the appointment of a receiver); San Jose Safe Deposit Bank of Savings v. Bank of Madera, 121 Cal. 543, 54 Pac. 85; State Inv. & Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

11. State Inv. & Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

ises under a decree of foreclosure, his proceedings are suspended by an appeal with stay bond.[12]

V. PROCEEDINGS ON VIOLATION.

§ 227. Supersedeas and Prohibition.—Upon the violation of a statutory supersedeas, actual or threatened, the appellant may apply to the appellate court in which the appeal is pending for a writ of supersedeas.[13] This remedy is more effectual and comprehensive than that by writ of prohibition in all cases where the acts of the party restrained constitute proceedings which are stayed by an appeal. Moreover, prohibition may be denied where supersedeas affords a plain, speedy and adequate remedy in the ordinary course of law.[14] While it is true that the writ of prohibition has sometimes been granted at the instance of a party to the appeal, the existence of the remedy by supersedeas does not appear to have been called to the attention of the court, and the effect of such remedy was not discussed.[15] If, however, the applicant is not a party to the action, he cannot move for a supersedeas, and may therefore have a writ of prohibition.[16]

§ 228. Other Remedies.—Writ of review or certiorari will lie to annul proceedings of a trial court in violation

12. Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

13. Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357 (where an application for a writ of prohibition was treated as an application for a writ of supersedeas). See supra, § 215.

14. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020.

15. See the following cases in which a writ of prohibition was issued, without passing on the propriety of this form of remedy: Mark v. Superior Court, 129 Cal. 1, 61 Pac. 436; State Inv. & Ins. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549; Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147 (assuming prohibition to be the proper remedy though a proceeding to obtain a supersedeas was also instituted); Bliss v. Superior Court, 62 Cal. 543.

16. McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020 (explaining Havemeyer v. Superior Court,

of a supersedeas,[17] such, for example, as an order adjudging one in contempt for refusing to obey the order appealed from.[18] Contempt proceedings are proper on disobedience of an order of the appellate court staying execution, and the respondent cannot excuse himself from contempt by questioning the regularity of the steps resulting in the order.[19] In the exercise of its authority to preserve the property, that court is empowered to punish as for contempt the violation of any provision of a prohibitory injunction, where the parties refuse to allow the property to remain as it was at the date of the decree.[20] Inasmuch as the action of a trial court in attempting to enforce its judgment or order by contempt proceedings in violation of a stay pending an appeal therefrom is without jurisdiction and void, the party may invoke the remedy of habeas corpus to secure his discharge from an unlawful imprisonment imposed.[1]

84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121). See PROHIBITION.

17. Los Angeles City Water Co. v. Superior Court, 124 Cal. 368, 57 Pac. 216. (In Jacobs v. Superior Court, 133 Cal. 364, 85 Am. St. Rep. 204, 65 Pac. 826, the court calls attention to the fact that the syllabus gives an inaccurate statement of the decision in the Los Angeles City Water case, and that the point in the case was whether the court below, after an appeal from the order appointing a receiver accompanied by a stay bond, had jurisdiction to make certain subsequent orders.)

18. Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Stuttmeister v. Superior Court, 72 Cal. 487, 14 Pac. 35; Ballagh v. Superior Court, 25 Cal. App. 149, 142 Pac. 1123.

19. Romine v. Cralle, 83 Cal. 432, 23 Pac. 525. See CONTEMPT.

20. Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563. See supra, § 196.

1. Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956; Ex parte Orford, 102 Cal. 656, 36 Pac. 928. See, also, Estate of Stough, 173 Cal. 638, 161 Pac. 1, holding proceedings in violation of a supersedeas to be void.

I. RECORD ON APPEAL.

I. WHAT CONSTITUTES THE RECORD.

Matters Included.

§ 229. In General.—The Code of Civil Procedure contains the following provisions as to what constitutes the record on appeal:

"On appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions upon which the appellant relies."[2]

"On appeal from a judgment rendered on an appeal, or from an order, except an order granting a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below."[3]

"On appeal from an order granting a new trial the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, the judgment-roll and any bill of exceptions prepared and settled as provided in section six hundred fifty of this code subsequently to the order granting the motion."[4]

With reference to the corresponding sections of the Practice Act, Judge Sawyer said: "These several modes mentioned are all the methods provided for making a record on appeal in the ordinary proceedings authorized by the Practice Act. Each form is peculiarly adapted to the preparation, in a simple and direct mode, of an authentic record for the particular class of cases for which it is provided, which shall fairly present the exception taken and everything necessary to illustrate it. And we think these several modes convenient and certain, and fully adequate to all the exigencies of proceedings on appeal. Other modes, especially when wholly or in part ex parte, are liable to, and often do, result in an imper-

2. Code Civ. Proc., § 950.
3. Code Civ. Proc., § 951.
4. Code Civ. Proc., § 952.

fect or partial record. The statute has provided a uniform mode of procedure for each class of proceedings, and the court is not authorized to recognize any other."[5]

§ 230. **Notice of Appeal.**—The Code of Civil Procedure makes the notice of appeal a part of the record, whether the appeal is from a final judgment,[6] from a judgment rendered on appeal or from an order generally,[7] or from an order granting a new trial.[8] The purpose and preparation of a notice of appeal have already been discussed in this article,[9] and the necessity for such a showing in the record will be noticed later.[10] It will be sufficient in this place to observe that although the statute requires that a copy of the notice of appeal shall be served upon the adverse party, there is no provision in the statute, or in the rules of the supreme court, prescribing the mode in which such service shall be authenticated. The better practice is to have the proof of such service made a part of the record in the court from which the appeal is taken, in order that there may be evidence in that court that the judgment has been removed therefrom. If, however, the record, as certified, is silent upon the fact of such service, that fact itself will not authorize a dismissal of the appeal, for upon objection by the respondent, the appellant will be allowed to make proof thereof. For this purpose he may file in the appellate court either original proof of such service, or a certificate of the clerk below that such proof has been made and filed in that court.[11] No provision being made for the filing of the notice of appeal in the appellate court, it cannot constitute a part of the record on appeal unless it appears in the transcript.[12]

5. Wetherbee v. Carroll, 33 Cal. 549.

6. Code Civ. Proc., § 950 (see supra, § 229).

7. Code Civ. Proc., § 951 (see supra, § 229).

8. Code Civ. Proc., § 952 (see supra, § 229).

9. See supra, §§ 107–135.

10. See infra, § 246.

11. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986 (per Harrison, J.).

12. Bonds v. Hickman, 29 Cal. 460.

§ 231. Judgment-roll.—The code provides that the judgment-roll shall be a part of the record where the appeal is from a final judgment,[13] and from an order granting a new trial.[14] The judgment-roll is the record of the judgment, and the recitals in a judgment are the court's records of its own acts.[15] Where there is no bill of exceptions, and no statement or substitute therefor, the appeal must be determined by what is disclosed in the judgment-roll alone.[16] In such a case, the appellant is practically in the same position as one attacking a judgment collaterally; that is, he contends that the judgment-roll does not show jurisdiction.[17] Reference should be made to later parts of this article for discussion as to what constitutes the judgment-roll,[18] and as to what record other than the roll is required for an appeal.[19]

At common law, before the postea and entry of judgment, the roll was known as the issue roll, or nisi prius roll; after the entry of judgment it was called the judgment-roll. No judgment-roll was known in courts of

13. Code Civ. Proc., § 950 (see supra, § 229).

14. Code Civ. Proc., § 952 (see supra, § 229).

15. Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

16. Estate of Parsons, 159 Cal. 425, 114 Pac. 570; Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870; Harper v. Minor, 27 Cal. 107. Conversely, where there is no judgment-roll, the appellate court may only review the matters embraced in the bill of exceptions. Britt v. East Side Hdw. Co., 25 Cal. App. 231, 143 Pac. 244.

17. La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765.

The main difference between collateral and direct attack upon a judgment is that upon collateral attack the record alone can be inspected and is conclusively presumed to be correct, while on direct attack the true facts may be shown in contradiction of the record. Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Lick v. Stockdale, 18 Cal. 219.

In these cases "record" seems to be used as meaning "the judgment-roll." The contents of the judgment-roll, however, are not the same as the contents of the record on appeal. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122. One might be said to be the "record of the judgment," the other is the "record on appeal," which, when the appeal is from the judgment, includes, of course, the record of that judgment. See infra, § 257.

18. See infra, §§ 250–258.

19. See infra, §§ 259–265.

equity. Under the California practice, the judgment-roll is not and cannot be required to be made until final judgment has been made and entered.[20]

§ 232. Bill of Exceptions.—Bills of exception were unknown at common law, but were introduced into English jurisprudence by a statute of 13 Edw. I.[1] Under the Practice Act in California, bills of exception were used only on appeals from judgments,[2] and could not be used on appeals from orders.[3] Under the Code of Civil Procedure, however, bills of exception are equally applicable to any and all kinds of appeals,[4] including appeals from final judgments,[5] and appeals from orders granting a new trial.[6] A bill of exceptions duly proposed and settled on a motion for a new trial may be used in support of an appeal from the judgment although it was not regularly used on the motion for a new trial,[7] and although (under former practice) no appeal was taken from the order denying a new trial.[8] A supplemental bill may be used, showing a waiver of failure to serve the principal bill of exceptions, on an appeal from a judgment, though it could not on an appeal from an order denying a new trial.[9]

The purpose of a bill of exceptions is to make a record of that which would otherwise not constitute a part of the record.[10] Consequently, a bill of exceptions, or some sub-

20. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

1. 2 Ruling Case Law, p. 140.

2. Yates v. Smith, 40 Cal. 662; Harper v. Minor, 27 Cal. 107.

3. People v. Doe, 45 Cal. 43; Caufield v. Doe, 45 Cal. 221; Wetherbee v. Carroll, 33 Cal. 549; Quivey v. Gambert, 32 Cal. 304.

4. Brandt v. Clark, 81 Cal. 634, 22 Pac. 863. See infra, § 266.

5. Code Civ. Proc., § 950 (see supra, § 229).

6. Code Civ. Proc., § 952 (see supra, § 229).

7. Vore v. Ephraim, 173 Cal. 245, 159 Pac. 719; Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Dresser v. Allen, 17 Cal. App. 508, 120 Pac. 65.

8. Haviland v. Southern Cal. Edison Co., 172 Cal. 601, 158 Pac. 328; Vinson v. Los Angeles Pac. R. Co., 141 Cal. 151, 74 Pac. 757.

9. Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

10. Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639; Campbell v. Co-

stitute therefor, must be used whenever it is necessary to bring up on appeal matters which are not contained in the judgment-roll.[11]

A later subdivision of this article treats of bills of exception in detail,[12] discussing, among other points, the matters to be included in a bill,[13] the proceedings for settlement,[14] the time for presentation and settlement,[15] the availability of mandamus to compel settlement,[16] and the right of settlement by the supreme court.[17]

§ 233. Papers Used on Hearing Below.—The code provides that "on appeal from a judgment rendered on an appeal, or from an order, except an order granting a new trial," the record on appeal shall include "a copy . . . of papers used on the hearing in the court below."[18] These papers must be authenticated as having been used on the hearing below,[19] for only the papers used below constitute the record on appeal, and not the papers on file.[20] If the record is prepared under the original method, the papers so used must be incorporated in a bill of exceptions.[1] If the record is prepared under the alternative method, they must be included in the reporter's transcript.[2]

The following provision, added to the code in 1919, apparently has not been the subject of judicial construction to date, but is obviously of far-reaching importance:

"If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the

burn (Hayes), 77 Cal. 36, 18 Pac. 860; People v. Judge of Tenth Judicial Dist., 9 Cal. 19; Parsons v. Davis, 3 Cal. 421; In re Ling, 2 Cal. Unrep. 490, 7 Pac. 660. See, also, infra, § 266.

11. See infra, §§ 259–265.

12. See infra, §§ 266–309.

13. See infra, §§ 268–272.

14. See infra, §§ 273–279.

15. See infra, §§ 283–288.

16. See infra, §§ 296–301.

17. See infra, §§ 302–309.

18. Code Civ. Proc., § 951 (see supra, § 229).

19. See infra, § 325.

20. Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022.

1. See infra, §§ 325, 328.

2. See infra, §§ 325, 355.

court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal."[3]

§ 234. Alternative Method of Preparing Record.— Under the alternative method of preparing a record on appeal, available to "any person desiring to appeal from any judgment, order or decree of the superior court to the supreme court or any of the district courts of appeal,"[4] the reporter's transcript becomes a part of the record as a substitute for the bill of exceptions.[5] This alternative method of preparing the record on appeal is entirely independent of the alternative method of appeal itself,[6] and whether the appeal has been taken by the old or the alternative method, the appellant may use the alternative method in preparing his record on appeal.[7] The fact that the appellant at one time contemplated an appeal upon a bill of exceptions, and took steps to obtain an extension of time for the preparation thereof, cannot deprive him of the right of bringing up the appeal by a reporter's transcript.[8] The use of the alternative method of appeal has found little favor with the courts,[9] but is often used by counsel, due to the simplicity of the proceedings involved in the preparation of the transcript[10] and the fact that it need not be printed.[11] Portions of the transcript which

3. Code Civ. Proc., § 953 (as amended by Stats. 1919, p. 290).

4. Code Civ. Proc., § 953a.

5. Schmitt v. White, 172 Cal. 554, 158 Pac. 216; Pierce v. Works, 171 Cal. 684, 154 Pac. 852; Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

6. Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100. And see infra, § 338, supra, § 105.

7. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Nezik v. Cole, 29 Cal. App. Dec. 723, 184 Pac. 523; Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100 (the leading case).

8. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429.

9. See infra, § 337.

10. See supra, §§ 104–109.

11. See infra, § 357.

are to be reviewed by the appellate court must be printed in the briefs, however, or in supplements thereto,[12] and it has been pointed out that a brief so prepared is much more than the ordinary brief under the old practice, since it becomes a part of the record on appeal.[13] Reference should be made to later portions of this article for detailed discussion of the alternative method of preparing the record on appeal.[14]

Matters Excluded.

§ 235. Opinion of Lower Court.—The rule is well established in California that the opinion of the lower court is not a part of the record on appeal,[15] although the appellate court is always glad to find it in the transcript,[16] because it is, as a rule, an aid in discovering the processes by which the judgment below was reached.[17] Not being a part of the record, it cannot be considered on appeal.[18] When it is incorporated in the transcript, it may be stricken out on motion.[19] Since an opinion is not part of the record, it must be carefully distinguished from a finding,[20] and from a decision.[1]

12. See infra, §§ 359–365.

13. San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378. See infra, § 422.

14. See infra, §§ 336–365.

15. Classen v. Thomas, 164 Cal. 196, 128 Pac. 329; Goldner v. Spencer, 163 Cal. 317, 125 Pac. 347; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Estate of Shively, 145 Cal. 400, 78 Pac. 869; Estate of Kendrick, 130 Cal. 360, 62 Pac. 605; Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448; People v. Flood, 102 Cal. 330, 36 Pac. 663; White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Estate of Cahill, 74 Cal. 52, 15 Pac. 364; Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861; People v. Quong Sing, 20 Cal. App. 26, 127 Pac. 1052; Spencer v. McCament, 7 Cal. App. 84, 93 Pac. 682; Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Hewlett v. Steele, 2 Cal. Unrep. 157.

16. Estate of Felton, 176 Cal. 663, 169 Pac. 392; Hidden v. Jordan, 28 Cal. 301.

17. Estate of Felton, 176 Cal. 663, 169 Pac. 392.

18. See infra, § 394.

19. White v. Merrill, 82 Cal. 14, 22 Pac. 1129.

20. McClory v. McClory, 38 Cal. 575; Hidden v. Jordan, 28 Cal. 301.

1. Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

As the reason for the rule that the opinion of the lower court is not part of the record on appeal, it has been said that the opinion of the judge in making an order is not a part of the order itself, but merely his reason for making it.[2] No matter what reason the court below may assign for its action, the appellate court is not bound by such reason. Counsel may cite it in argument, as they may any other opinion given at nisi, and it may sometimes aid the appellate court in the solution of the question upon or to which it is cited; but it is not an act upon which error can be assigned. For this reason—possibly for others also—the legislature, in adopting the code, has omitted it from the list of papers required to be brought up on appeal.[3]

Letters and memoranda of trial judge.—Similarly letters from the trial judge to the attorney of one of the parties, written subsequent to the order in question, stating the ground of the ruling, are not part of the record on appeal.[4] So, also, a memorandum from the trial judge to the clerk, stating the grounds of an order, is not a part of the record.[5]

§ 236. **Statement on Motion for New Trial.**—The Practice Act provided for statements on appeal and statements on motion for a new trial. The code originally did not provide for statements at all, but amendments were made in 1874 restoring statements on motion for new trial, and providing that they might be used on appeal from the judgment if used on the motion.[6] An amendment of 1915, however, abolished such statements entirely.[7]

2. People v. Flood, 102 Cal. 330, 36 Pac. 663.

3. White v. Merrill, 82 Cal. 14, 22 Pac. 1129.

4. Weisser v. Southern Pacific R. Co., 148 Cal. 426, 7 Ann. Cas. 636, 83 Pac. 439; Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326.

5. Whitney v. Northwestern Pac. R. Co., 39 Cal. App. 139, 178 Pac. 326.

6. Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225.

7. Code Civ. Proc., § 658, as amended by Stats. 1915, p. 201, providing that application for new trial shall be made in certain cases

Under the Practice Act, a statement on motion for new trial could be used only in reviewing the order made thereon, in the absence of a stipulation allowing its use on an appeal from the judgment.[8] Under the code, however, a statement settled in connection with a motion for a new trial might be used on an appeal from a judgment.[9]

It was originally held, under the code, that a statement on motion for a new trial could not be used on an appeal from the judgment unless it was actually used on a motion for a new trial.[10] Later, however, it was held that the right to so use it does not depend upon the fact that it was actually used on a motion for a new trial,[11] or that an appeal was taken from the order denying the motion for a new trial;[12] but it was still required that there be a valid proceeding on a motion for a new trial and that the statement be properly prepared in connection with such proceeding.[13]

§ 237. Statement on Appeal.—Under the Practice Act, statements on appeal constituted a part of the record for the appellate court,[14] and any statement agreed to by the

upon affidavits; and in other cases upon the minutes of the court. See NEW TRIAL.

8. Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Thompson v. Connolly, 43 Cal. 636; Casgrave v. Howland, 24 Cal. 457.

9. Neale v. Morrow, 174 Cal. 49, 161 Pac. 1165; Wall v. Mines, 128 Cal. 136, 60 Pac. 682.

10. Brind v. Gregory, 120 Cal. 640, 53 Pac. 25; Richardson v. Eureka, 96 Cal. 443, 31 Pac. 458 (where the court recognizes the rule, but presumes that the statement was used); Mix v. San Diego etc. R. Co., 86 Cal. 235, 24 Pac. 1027; Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225 (the leading case for this rule).

11. Neale v. Morrow, 174 Cal. 49, 161 Pac. 1165; Vinson v. Los Angeles Pacific R. Co., 141 Cal. 151, 74 Pac. 757; Bernard v. Sloan, 138 Cal. 746, 72 Pac. 360; Kelly v. Ning Yung Ben. Assn., 138 Cal. 602, 72 Pac. 148; Wall v. Mines, 128 Cal. 136, 60 Pac. 682 (the leading case for the present rule).

12. Neale v. Morrow, 174 Cal. 49, 161 Pac. 1165 (citing earlier cases to the same effect); Vinson v. Los Angeles etc. R. Co., 141 Cal. 151, 74 Pac. 757.

13. Neale v. Morrow, 174 Cal. 49, 161 Pac. 1165. See NEW TRIAL.

14. Leading cases discussing statements on appeal under the California Practice Act are Treadwell v. Davis, 34 Cal. 601, 94 Am.

parties, or duly settled and certified by the court, became a part of the record, just as a bill of exceptions, demurrer to evidence, or any other mode by which questions of law or matters of evidence were made part of the record by the old system of practice.[15] The office of a statement on appeal was to bring into the record the orders and proceedings, with the facts necessary to sustain them, which were not contained in the judgment-roll;[16] or, in other words, to make that a record, which was before not a record.[17]

The Code of Civil Procedure, adopted in 1872, did not preserve the provisions of the Practice Act relating to statements on appeal,[18] and such papers do not now exist or constitute a part of the record on appeal.[19] In view of this fact, it has been deemed unnecessary to enter into a detailed discussion of statements on appeal in this work.

§ 238. Matters Stated in Specification of Errors—*Miscellaneous Matters.*—The specification of particular errors (although, under the former practice, essential on an appeal,[1] or to a statement on motion for new trial).[2] was merely the act of an attorney annexed to such statement, or to the bill of exceptions, for the purpose of pointing out the particulars in which errors were committed at the trial.[3] The matters to which such specifications pointed, had to be found in the

Dec. 770; Wetherbee v. Carroll, 33 Cal. 549; Kavanagh v. Maus, 28 Cal. 261, and Harper v. Minor, 27 Cal. 107.

15. Towdy v. Ellis, 22 Cal. 650.

16. Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Harper v. Minor, 27 Cal. 107; Reynolds v. Harris, 8 Cal. 617.

17. De Johnson v. Sepulbeda, 5 Cal. 149.

18. Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Witter v. Andrews, 122 Cal. 1, 54 Pac. 276; Beets v. Chart, 79 Cal. 185, 21 Pac. 730; People v. Crane, 60 Cal. 279.

19. Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Witter v. Andrews, 122 Cal. 1, 54 Pac. 276.

1. See infra, § 406 et seq.

2. See NEW TRIAL.

3. Braverman v. Fresno Canal & Irr. Co., 101 Cal. 644, 36 Pac. 386; People v. Faulke, 96 Cal. 17, 30 Pac. 837.

substantive portion of the statement,[4] or they could not be considered by the appellate court.[5] This rule was applied to various matters stated in the specifications but not in the substantive portions of the statement, such as the absence and nonwaiver of findings,[6] arguments of counsel,[7] evidence,[8] exceptions,[9] instructions to the jury,[10] and testimony.[11] Matters contained in the record import verity and are conclusive upon the appellate court,[12] but if the appellate court had been required to accept as facts the statements in the specification of errors, there would have been few, if any, cases which would not have been reversed.[13]

Miscellaneous matters.—The following matters are not parts of the record in California: A rule of the lower court;[14] statements of counsel,[15] including information in briefs;[16] mere recitals in objections of counsel;[17] and supplementary affidavits filed long after the perfecting of the appeal.[18] An order directing a receiver to file his final ac-

4. Gilbert v. Peck, 162 Cal. 54, Ann. Cas. 1913C, 1349, 121 Pac. 315; Craig v. Hesperia Land & W. Co., 107 Cal. 675, 40 Pac. 1057; Braverman v. Fresno Canal & Irr. Co., 101 Cal. 644, 36 Pac. 386; People v. Faulke, 96 Cal. 17, 30 Pac. 837.

5. See generally the cases cited infra, this section.

6. Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Smith v. Lawrence, 53 Cal. 34.

7. People v. Faulke, 96 Cal. 17, 30 Pac. 837.

8. Ferrier v. Ferrier, 64 Cal. 23, 27 Pac. 960.

9. Craig v. Hesperia Land & W. Co., 107 Cal. 675, 40 Pac. 1057.

10. Gilbert v. Peck, 162 Cal. 54, Ann. Cas. 1913C, 1349, 121 Pac. 315; Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Braverman v. Fresno Canal & Irr. Co., 101 Cal. 644, 36 Pac. 386; Goldman v. Bashore, 80 Cal. 146, 22 Pac. 82; Smith v. Lawrence, 53 Cal. 34; Polkinghorn v. Riverside Portland Cement Co., 24 Cal. App. 615, 142 Pac. 140.

11. People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

12. See infra, § 390.

13. Ferrier v. Ferrier, 64 Cal. 23, 27 Pac. 960.

14. Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870.

15. Hood v. Hamilton, 33 Cal. 698.

16. Morris v. Iden, 23 Cal. App. 388, 138 Pac. 120.

17. Davis v. Baker, 88 Cal. 106, 25 Pac. 1108; Nims v. Johnson, 7 Cal. 110.

18. R. H. Herron Co. v. Westside Electric Co., 18 Cal. App. 778, 124 Pac. 455.

count, a brief account by the receiver, and a statement of offsets disallowed by the receiver do not constitute a record for appeal.[19] There is no law authorizing an appellate court to notice a paper certified by the judge of the court below as containing "an abstract of the evidence given," and it must therefore be disregarded.[20]

II. MATTERS REQUIRED IN RECORD.

§ 239. General Rules.—It is incumbent upon the appellant to show error by his record on appeal,[1] for an appellate tribunal cannot take judicial knowledge of proceedings in lower courts,[2] and every presumption is in favor of the correctness of the rulings and decisions of the court below.[3] In other words, error must appear affirmatively from the record,[4] for the presumption is indulged that the proceedings below were correct so far as this presumption is not overcome by the record.[5] Thus it has been said that all intendments must be in favor of sustaining the judgments of courts of original jurisdiction; that to disturb such judgments, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record.[6] All intendments consistent with the record presented must be taken in support of the proceedings of the court below.[7] If the record

19. Adams v. Woods, 21 Cal. 165.

20. Estate of Tanner, 70 Cal. 22, 11 Pac. 326.

1. Bituminized Brick & Tile Co. v. Simons Brick Co., 60 Cal. Dec. 299, 192 Pac. 528; Estate of Allen, 175 Cal. 354, 165 Pac. 1010; Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65; Nash v. Harris, 57 Cal. 242; Todd v. Winants, 36 Cal. 129; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383.

2. Nash v. Harris, 57 Cal. 242.

3. See infra, § 499 et seq.

4. Foster v. Young, 172 Cal. 317, 156 Pac. 476; Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401; In re Yoakam, 103 Cal. 503, 37 Pac. 485; Campbell v. Walls, 77 Cal. 250, 19 Pac. 427; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Costa v. Raza, 23 Cal. App. 754, 139 Pac. 899; Miller v. Griffith, 4 Cal. App. 341, 88 Pac. 285.

5. Moore v. Massini, 43 Cal. 389.

6. White v. Abernathy, Clark & Co., 3 Cal. 426. See infra, § 499.

7. Doyle v. Franklin, 48 Cal. 537.

brought to the appellate court does not disclose the error relied upon, there is nothing for it to examine,[8] and the order appealed from will be affirmed,[9] or the appeal will be dismissed.[10] Therefore, a party appealing from an order must bring up a record demonstrating conclusively that the lower court erred in its ruling, or he must fail in his appeal.[11] A respondent's objection because of the failure of the record to disclose error is not waived by failing to take an exception thereto in accordance with a rule of the supreme court requiring the respondent to take exception to certain technical objections to the record, for the question is not whether the appellants may be heard on the points of error assigned, but it is whether the record, as presented, discloses any error.[12]

§ 240. Jurisdiction of Court.—Upon direct appeal it is essential for the party seeking to sustain a judgment to show by the record itself that the court below had jurisdiction of the defendant. Recitals in the judgment will not be accepted as a substitute for the summons and proof of service;[13] and there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant unless it is shown by the record.[14] Applying this rule, it has been held that an order for the publication of summons will not be considered unless it is part of the record.[15]

8. Todd v. Winants, 36 Cal. 129. See infra, §§ 393–404, as to questions presented for review.

9. Evans v. Jacobs, 59 Cal. 629. See infra, § 575.

10. Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396.

11. Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Skinner v. Horn, 146 Cal. 62, 79 Pac. 597,

12. Todd v. Winants, 36 Cal. 129 (referring to Rule XIII, now Rule XV).

13. Houghton v. Tibbets, 126 Cal. 57, 58 Pac. 318; Linott v. Rowland, 119 Cal. 452, 51 Pac. 687; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302; Yolo County v. Knight, 70 Cal. 430, 11 Pac. 662; McKinlay v. Tuttle, 42 Cal. 570 (the leading case).

14. Sichler v. Look, 93 Cal. 600, 29 Pac. 220. See infra, § 502.

15. Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302.

Nevertheless, it is not always necessary that the judgment-roll show that the court acquired jurisdiction of the defendant if the court finds that he was duly served with process,[16] for if the recital of jurisdiction finds support in other portions of the record, which, under any condition of facts, could exist, it will be presumed, in the absence of any contrary showing, that such condition of facts existed.[17] Thus it has been held that where the judgment recites due service of summons, it will be presumed, in the absence of a contrary showing, that there was a valid order for publication[18] or a valid order authorizing the service of an amended complaint.[19] Moreover, if the summons is absent from the judgment-roll, it may be shown by the other parts of the judgment-roll that it was in fact issued, and this will prima facie sustain the jurisdiction of the court.[20] If the record does not show the service of amended pleadings, it will be presumed, in the absence of affirmative showing to the contrary, that they were regularly served and that evidence thereof was before the court when it made its decree.[1]

Jurisdiction of appellate court.—In considering questions relating to the jurisdiction of the appellate court, the distinction must be borne in mind as between jurisdiction over the subject matter and jurisdiction over the person. The law itself defines the scope and limitations of the former, whereas jurisdiction over the person is contingent upon process and service thereof in the particular case. It is manifest that what has been said in reference to the necessity for an affirmative showing in the record

16. Lick v. Stockdale, 18 Cal. 219.

17. Sichler v. Look, 93 Cal. 600, 29 Pac. 220. To the same effect see, also, Whitney v. Daggett, 108 Cal. 232, 41 Pac. 471.

18. McHatton v. Rhodes, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036; Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

19. Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853.

20. Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698.

1. Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027; Gould v. Crawford, 32 Cal. App. Dec. 720, 192 Pac. 88.

applies to jurisdiction over the person—not as to subject matter. It is clear also that notice of appeal and proof of service thereof as a prerequisite of the jurisdiction of the appellate court over the person of the defendant must appear by the record.[2] If the appellate court has no jurisdiction over the subject matter of the action, it will dismiss the appeal even though the point has not been raised by the respondent, since it is wholly without authority to proceed in such a case.[3] Likewise, it will dismiss the appeal if it has no jurisdiction over the person of the respondent.[4]

§ 241. Objections of Appellant.—Ordinarily, it seems that the record must show affirmatively the appellant's objections to the rulings of the trial court. Thus, it has been said that a ruling admitting testimony cannot be disturbed where the record merely reveals that objection was made to its admission and was overruled,[5] for the grounds of the objection must be specified in order that the appellate court may determine whether the ruling of the lower court was correct or otherwise.[6] Thus, a finding said to rest partly on parol evidence tending to vary the terms of a written agreement will not be reviewed if the record does not show that objection to such proof was made on this ground.[7] Again, it has been said that where the appellant questions the exclusion of evidence, the record must show that the question was objected to or excluded and that the answer would have been of importance, and not merely that when a statement was objected to, counsel dropped the matter.[8] In harmony with the rule that an objection must appear in the record is the rule that no

2. See infra, § 246.

3. Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113.

4. See infra, §§ 246, 434.

5. Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213.

6. Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Jones v. Deardorff, 4 Cal. App. 18, 87 Pac. 213. See supra, §§ 82–87.

7. McCombs v. Church, 180 Cal. 233, 180 Pac. 535. See supra, § 87.

8. Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373.

express statement is required that a party failed to object to evidence of fraud. If such objection was made, it is the right of the party objecting to show it.[9] It may be observed, also, that where the appeal is by the plaintiff, the objections and exceptions of the defendant have no place in the record.[10]

The record must also show the facts on which a ruling is based before the appellate court will consider an objection thereto,[11] and the record should show that an objection to the answer was made by demurrer or otherwise in the court below.[12] An objection that the plaintiff should have been allowed to amend his complaint is of no effect where it does not appear that any application was made to amend it.[13]

§ 242. Exceptions to Ruling.—Except in the cases specified in section 647 of the Code of Civil Procedure,[14] an exception must be taken at the time the decision is made, and, if not, the objection to the ruling cannot be urged on appeal.[15] Where the record fails to indicate any such ruling of the trial court or exception taken on behalf of the appellant, the appellate court cannot pass upon any alleged errors of law committed on the trial.[16] If the findings support the judgment, and the record discloses no exceptions to the admission of testimony or to any ruling of the court, the judgment below will be

9. Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

10. Harris v. Frank, 81 Cal. 280, 22 Pac. 856.

11. Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467.

12. Rivera v. Cappa, 29 Cal. App. 496, 156 Pac. 1016, 1017.

13. Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353. See supra, § 81.

14. See supra, § 96, as to errors deemed excepted to.

15. Randall v. Freed, 154 Cal. 299, 97 Pac. 669; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549; Austin v. Andrews, 71 Cal. 98, 16 Pac. 546; Russell v. Dennison, 45 Cal. 398; Thiele v. Koster, 63 Cal. 241; McCartney v. Fitz Henry, 16 Cal. 184; Crackel v. Crackel, 17 Cal. App. 600, 121 Pac. 295; Briggs v. Waggenheim, 1 Cal. Unrep. 518; People v. Jenkins, 1 Cal. Unrep. 77.

16. Smith v. Smith, 163 Cal. 630, 126 Pac. 475; Kellogg v. Crippen, 1 Cal. Unrep. 161.

affirmed.[17] Similarly, where, prior to 1909, an appeal was taken because of the modification of an instruction to the jury, it was necessary that the record show that an exception was reserved to the ruling.[18] No particular form of exception, however, seems to be required in the record.[19] Thus a sufficient exception to a charge given to the jury is shown where the statement declares that the party excepted to each part thereof,[20] for it is quite unnecessary that the record show an objection of counsel with the reasons therefor, and then an order of the court overruling the objection, and then the words: "We except."[1] Prior to the amendment of section 647 of the Code of Civil Procedure in 1909,[2] it was required that the record show that an exception was taken to the order of the court granting a nonsuit, and in the absence of such a showing it was presumed that no exception was taken.[3] An exception to a nonsuit must appear in the stating or substantive part of the bill of exceptions or statement. It is not sufficient that it be referred to in the assignment of the errors relied on.[4]

§ 243. Waiver of Findings.—It was once said that the record must contain the findings of fact or a showing that they have been waived in order to support the judgment of the court below.[5] Nevertheless, it is now well settled that the mere nonappearance of findings or a waiver in the record does not necessarily establish the commission

17. Hutchinson v. Ryan, 11 Cal. 142. See supra, § 95.

18. Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33.

19. McCreery v. Everding, 44 Cal. 246. See supra, § 100.

20. Bowman v. Cudworth, 31 Cal. 148; McCreery v. Everding, 44 Cal. 246.

1. McCreery v. Everding, 44 Cal. 246.

2. Stats. 1909, p. 586, providing that an order granting or denying a motion for a new trial shall be deemed excepted to; Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787.

3. Craig v. Hesperia Land & W. Co., 107 Cal. 675, 40 Pac. 1057; Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218.

4. Craig v. Hesperia Land & W. Co., 107 Cal. 675, 40 Pac. 1057. See, also, supra, §§ 97, 238.

5. Dowd v. Clarke, 51 Cal. 262 distinguished and limited in Mulcahy v. Glazier, 51 Cal. 626.

of error, for it will be presumed, in favor of the action of the court below, that findings were waived, unless a contrary showing is made.[6] This presumption is applicable notwithstanding the certificate of the clerk that findings were not waived, for this certificate forms no part of the record which can be noticed on appeal;[7] and notwithstanding the fact that purported findings, which are not indorsed as filed, are dated after the rendition of the judgment.[8] The presumption has no application, however, where the court merely makes an insufficient and incorrect finding.[9] It is not sufficient merely to specify the absence of findings as an error at law in the specifications at the conclusion of the bill of exceptions, for, in the absence of an affirmative showing that findings were not waived, it will be presumed that they were waived.[10]

§ 244. **Grounds of Motion for New Trial.**—The record on appeal from an order granting or denying a new trial should, it has been held, show the grounds on which the motion was based,[11] and the error committed in

6. Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70; Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Tomlinson v. Ayres, 117 Cal. 568; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965; Estate of Arguello, 85 Cal. 151, 24 Pac. 641; Coyhinech v. Coyhinech, 80 Cal. 410, 22 Pac. 175; Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970; In re Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Estate of Sanderson, 74 Cal. 199, 15 Pac. 753; Estate of Noah, 73 Cal. 590, 2 Am. St. Rep. 834, 15 Pac. 290; Carr v. Cronan, 54 Cal. 600; Reynolds v. Brumagim, 54 Cal. 254; Smith v. Lawrence, 53 Cal. 34; Mulcahy v. Glazier, 51 Cal. 626 (the leading case); California Central Creameries Co. v. Crescent City Light etc. Co., 30 Cal. App. 619, 159 Pac. 209; Ewing v. Napa Valley Brewing Co., 18 Cal. App. 135, 122 Pac. 836; Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700; Ladd v. Myers, 4 Cal. App. 352, 87 Pac. 1110.

7. Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860.

8. Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970.

9. People v. Forbes, 51 Cal. 628.

10. Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Smith v. Lawrence, 53 Cal. 34. See supra, § 238.

11. Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012.

granting or refusing the request.[12] In other words, it should show what the ruling was and what the appeal is from.[13] Thus, it has been held that alleged delay in service of a notice of intention to move for a new trial which does not appear in the record cannot be considered on appeal.[14] Mere general specifications that the court erred in rendering judgment are not sufficient.[15] When the record upon appeal contains a bill of exceptions, in which is set out what purports to be a copy of the notice of intention to move for a new trial, which designates no proper grounds for the motion, it cannot be presumed, in support of an order granting a new trial, that there was another notice which designated other grounds than those designated in such copy.[16]

Moreover, it is essential to the right of an appellate court to review the action of a trial court on a motion for a new trial that it should appear by the record that the ground for a new trial presented in the appellate court was the ground for the motion made in the trial court.[17] Nevertheless, where there is a statement on motion for a new trial or a bill of exceptions containing specifications of error, the presumption is that the specifications and assignments in the statement or bill conform to those in the notice and constitute the grounds upon which the court was asked to grant a new trial.[18]

12. Loucks v. Edmondson, 18 Cal. 203. And see cases cited infra.

13. Watts v. Crawford, 1 Cal. Unrep. 356.

14. Nippert v. Warneke, 128 Cal. 501, 61 Pac. 96.

15. Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151.

16. Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527.

17. Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151.

18. Cross v. Mayo, 167 Cal. 594, 140 Pac. 283 (citing, as substantially supporting this statement, Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706, and Southern Pac. R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627); Whitcomb v. Worthing, 30 Cal. App. 629, 159 Pac. 613. In Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734, and in Cross v. Mayo, 167 Cal. 594, 140 Pac. 283, the court distinguished

§ 245. Notice of Motion for New Trial.—The rule is well established in California that it is not necessary that the record show that notice was given of a motion for a new trial.[19] This rule applies equally whether the order appealed from was made in a statement of the case or on the minutes of the court.[20] If, as a matter of fact, there was no notice as a basis of the motion in the court below, that fact must be affirmatively shown in the record by the party seeking to take advantage of it.[1] Unless he does so, it will be presumed by the appellate court that proper notice was given in due time.[2]

The early rule required the record to show that notice had been given,[3] but this rule was reversed following a statutory change making the notice of a motion for a new trial no longer a part of the judgment-roll.[4] This statute was held to show the intent of the legislature that the notice should no longer be an essential part of the record.[5]

Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012, and Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419, on the ground that no statement or bill of exceptions were used therein.

19. Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Reclamation District No. 556 v. Thisby, 131 Cal. 572, 63 Pac. 918; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Southern Pacific R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700; Scott v. Wood, 81 Cal. 398, 22 Pac. 87; Affierbach v. McGovern, 79 Cal. 268, 21 Pac. 837; Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706 (the leading case).

20. Schneider v. Market St. R. Co., 134 Cal. 482, 66 Pac. 734.

1. Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706.

2. Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Reclamation Dist. No. 556 v. Thisby, 131 Cal. 572, 63 Pac. 918; Patrick v. Morse, 64 Cal. 462, 2 Pac. 49.

3. Dominguez v. Mascott, 74 Cal. 269, 15 Pac. 773; Wright v. Snowball, 45 Cal. 654; Calderwood v. Brooks, 28 Cal. 151, all overruled in Pico v. Cohn, 78 Cal. 384, 20 Pac. 706. The same rule seems to have been accepted in Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278.

4. See infra, § 258.

5. Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706.

Nevertheless, if the notice is in fact set forth in the statement or bill of exceptions, and it appears therefrom that it was either insufficient or was not given within the proper time, it then becomes necessary for the appellant to have it appear by the record that this defect was overcome or waived, or it will be assumed, in support of an order denying a new trial, that it was made in consideration of the fact that proper notice had not been given.[6] Where the transcript contains a duly certified copy of a minute entry showing that a motion for a new trial was denied, and the statement discloses that it was prepared and settled to be used in the motion for new trial, it sufficiently appears by the record that motion was made for a new trial.[7] Similarly, where the order denying the motion for a new trial recites that a notice of intention was given, it sufficiently appears that such notice was given.[8]

§ 246. **Notice of Appeal.**—The Code of Civil Procedure explicitly requires that the appellant furnish the court with a copy of the notice of appeal on an appeal from a final judgment;[9] on an appeal from a judgment rendered on appeal or from an order generally;[10] and on an appeal from an order granting a new trial.[11] This requirement is applicable to records prepared under the alternative method, and a copy of the notice of appeal is, therefore, a necessary part of the record on appeal and should be included in the transcript in all cases.[12]

The appellant should also show in the record due service of the notice of appeal.[13] This is an affirmative

6. Reclamation District No. 556 v. Thisby, 131 Cal. 572, 63 Pac. 918.

7. Estate of Kilborn, 162 Cal. 4, 120 Pac. 762.

8. Braly v. Henry, 3 Cal. Unrep. 3, 18 Pac. 798.

9. Code Civ. Proc., § 950 (see supra, § 229).

10. Code Civ. Proc., § 951 (see supra, § 229). (Code Civ. Proc., § 951, excepts orders granting a new trial.)

11. Code Civ. Proc., § 952 (see supra, § 229).

12. Merritt v. City of Los Angeles, 162 Cal. 47, 120 Pac. 1064.

13. Reed v. Allison, 61 Cal. 461;

matter, to be proven by the appellant, for the respondent cannot be expected to prove a negative, that he had no notice.[14] The service of notice must therefore appear affirmatively, or the appellate court cannot take jurisdiction of the case,[15] but must dismiss it.[16] When the transcript contains the judgment and an order denying a new trial, but contains in place of a notice on appeal and evidence of the service of such notice a stipulation that notices of new trial and appeal were duly served and filed in time, it has been held that it is impossible to determine whether such appeal is taken from the judgment or from the order denying a new trial, or both.[17]

The requirements that the record contain a notice of appeal and show that it has been served do not seem to be rigorously enforced. Where there is no motion to dismiss the appeal, or where the respondent does not raise the objection that notice of appeal has not been given, it has been held that the appellate court will assume, even in the absence of the required notice of appeal, that the appeal was properly taken, and that the court has jurisdiction thereof.[18] Again, where there is no evidence in the transcript of the service of the motion, the appellant will be allowed to show by proper proof that a sufficient service has been made.[19] Failure to set forth the proper notice of appeal may be corrected on diminution of the record,[20] and where the original notice of appeal has been

People v. Alameda Turnpike Road Co., 30 Cal. 182; Hildreth v. Gwindon, 10 Cal. 490 (citing Practice Act, § 337); Franklin v. Reiner, 8 Cal. 340.

14. Franklin v. Reiner, 8 Cal. 340.

15. Reed v. Allison, 61 Cal. 461; People v. Alameda Turnpike Road Co., 30 Cal. 182; Hildreth v. Gwindon, 10 Cal. 490.

16. Pateman v. Tyrrel, 59 Cal. 320.

17. Hill v. Weisler, 49 Cal. 146.

18. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Merritt v. City of Los Angeles, 162 Cal. 47, 120 Pac. 1064.

19. Estate of Stratton, 112 Cal. 513, 44 Pac. 1028; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109.

20. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006. See infra, § 385, as to diminution of the record generally.

lost, papers showing service may be substituted.[1] It is the fact of service, rather than evidence thereof, which gives the appellate court jurisdiction, and such evidence may be shown in other modes than being incorporated in the transcript.[2]

§ 247. **Filing of Undertaking.**—The Code of Civil Procedure provides that the transcript shall be accompanied by

"A certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking."[3]

The requirements of this section of the code are plain and explicit, and must be complied with,[4] or the appeal will be dismissed.[5]

The wording of the section requires the clerk to certify to two distinct and separate facts, to wit, that the undertaking is in due form, and that it has been properly filed.[6] Accordingly, it is insufficient for the clerk merely to certify that "an undertaking in due form is on file in my office,"[7] or that an "'undertaking on appeal' was properly filed in my office," on a given date.[8] While it

1. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580.

2. Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8 (citing Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887, and Sichler v. Look, 93 Cal. 600, 29 Pac. 220). As to other modes of proving service, see supra, § 133 et seq.

3. Code Civ. Proc., § 953. Prior to the code, a similar showing was required in the transcript. Wakeman v. Coleman, 28 Cal. 58; Franklin v. Reiner, 8 Cal. 340; Bryan v. Berry, 8 Cal. 130.

4. Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260; San Francisco & Northern Pacific R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517.

5. Winder v. Hendrick, 54 Cal. 275; Watson v. Cornell, 52 Cal. 644; Ellis v. Bennet, 2 Cal. Unrep. 302, 3 Pac. 801.

6. Winder v. Hendrick, 54 Cal. 275.

7. Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260, (where it is pointed out that such a certificate does not show that it refers to an undertaking on appeal, nor that it was properly filed, nor does it show the date of filing).

8. Winder v. Hendrick, 54 Cal. 275 (appeal dismissed without

is not required that the exact language of the code be followed in the certificate, it must appear that the undertaking was filed, either "properly," or of a date that shows it was in due time,[9] and that the paper was not only properly filed, but was also "in due form."[10] These facts appear from a certificate that "a good and sufficient undertaking on appeal in due form was properly filed herein,"[11] and from a certificate that "a sufficient undertaking on appeal, in due form of law, was properly filed therein."[12]

It is insufficient to set out the undertaking in the transcript and to have the clerk certify the transcript, for the undertaking is not a part of the transcript, and the certificate that the transcript is correct does not cover the undertaking.[13] Again, it is insufficient to substitute the affidavit of the appellant, or of the clerk himself, for the certificate required by the code.[14] The fact that the certificate has been entered by the clerk under a different number is immaterial, however, if it is still a part of the records in the same appeal.[15]

§ 248. Records in Another Appeal.—Each party taking an appeal must present his own record with especial reference to the errors of which he complains. There would be no safety for a respondent if an appellant, after serv-

prejudice, however, to another appeal).

9. Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260.

10. Winder v. Hendrick, 54 Cal. 275, (in the absence of a certificate by the clerk that the undertaking was "in due form," it will be presumed on appeal that it was not in due form).

11. Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415, holding the certificate prima facie sufficient.

12. Meeker v. Hoffer, 57 Cal. 140.

13. Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; San Francisco & Northern Pacific R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517 (the leading case, observing that Wakeman v. Coleman, 28 Cal. 58, is based on a different statutory provision); Jones v. Iverson, 3 Cal. Unrep. 707, 31 Pac. 625.

14. Winder v. Hendrick, 54 Cal. 275.

15. Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237.

ing his transcript and brief, could argue his cause upon the record in some other appeal.[16] Consequently, if the plaintiff and the defendant each appeal from different portions of the same judgment, and the parties do not stipulate that either transcript shall be added to the other, each appeal must be heard upon its own transcript.[17] Similarly, if one codefendant appeals, he cannot take advantage of the fact that another codefendant was not served with process.[18] Again, a bill of exceptions prepared by one codefendant who is a respondent upon an appeal cannot be used by another codefendant.[19] Even where two actions have been consolidated in the court below, it has been held that the record in one case cannot be used in the other case if separate appeals have been taken.[20] It is not required, however, that there be a separate transcript for each case, provided the transcript sets forth the record for each appeal clearly and distinctly.[1] But in such case each appeal must be accompanied by its own undertaking, which must designate the particular appeal to which it relates.[2]

Successive appeals.—Where the appellate court, on account of a defect in the proceedings, dismisses an appeal without prejudice, it provides in some cases that if a second appeal be taken, the transcript filed in the first appeal may be used.[3] Otherwise, papers used in one appeal cannot be used in another appeal.[4]

16. Gates v. Walker, 35 Cal. 289, per Curry, C. J.

17. Gates v. Walker, 35 Cal. 289; Fair v. Stevenot, 29 Cal. 486.

18. McGary v. De Pedrorena, 58 Cal. 91.

19. Houghton v. Trumbo, 103 Cal. 239, 37 Pac. 152.

20. Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 25 Pac. 124. See ACTIONS, vol. 1, p. 375.

1. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

2. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187, (distinguishing People v. Center, 61 Cal. 191). And see supra, § 148.

3. Gordon v. Wansey, 19 Cal. 82; Dooling v. Moore, 19 Cal. 81.

4. Goyhinech v. Goyhinech, 80 Cal. 410, 22 Pac. 175, (where the court declined to consider a bill of exceptions prepared for an appeal from a nonappealable order). J. I. Case Threshing Co. v. Copren Bros., 35 Cal. App. 70, 169 Pac. 443 (where the court in fact considered a portion of the transcript of the former appeal, but indicated that it was not required to do so).

§ 249. Miscellaneous Matters. — Many miscellaneous matters must appear in the record. Thus, where it is urged that a writ of attachment is insufficient on account of a failure to state the amount of the claim, the record must contain the writ, and it is insufficient that a portion of it appears in an objection of counsel.[5] Where a jury is waived, it should distinctly appear from the record whether the whole action, or only the equity part of it, was tried and decided below. Failure to do this is loose practice, which sometimes leads to most perplexing difficulties.[6] Where the appeal is from the denial of a motion to vacate a judgment, the record must contain the judgment, for the court may have denied the motion on the ground that no judgment had been entered.[7] Where error is predicated on the court's failure to give certain instructions, they must appear affirmatively in the record.[8] Where an appeal is taken from an order, a copy of the order appealed from must be in the record or the appeal cannot be considered.[9]

Pleadings.—It is clear that an appeal will be dismissed if it contains no copy of the pleadings.[10] Thus it has been held that the pleadings must be a part of the record presented to the appellate court if it is to examine an order for a nonsuit,[11] or an order denying a motion for a new trial.[12] It is not necessary in all cases to bring up the pleadings in full, however, for a summary will in most cases answer every purpose on the appeal.[13] This summary must be agreed to by the counsel of the respec-

5. Davis v. Baker, 88 Cal. 106, 25 Pac. 1108.

6. Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

7. Savings & Loan Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624.

8. Polkinghorn v. Riverside Portland Cement Co., 24 Cal. App. 615, 142 Pac. 140; Patton v. Klemmer, 15 Cal. App. 459, 115 Pac. 62; Becker v. Feigenbaum, 5 Cal. Unrep. 408, 45 Pac. 837.

9. Timmons v. Coonley, 39 Cal. App. 35, 179 Pac. 429.

10. Hart v. Plum, 14 Cal. 148.

11. Todd v. Winants, 36 Cal. 129.

12. McQuade v. Whaley, 29 Cal. 612.

13. Todd v. Winants, 36 Cal. 129.

tive parties.[14] A stipulation that "the foregoing transcript is correct" does not cure a failure to include the pleadings in the record, for it merely takes the place of the clerk's certificate that the papers to which it is annexed are true copies.[15]

Entry of judgment.—Where the appeal is from a judgment, the record must show the entry of the judgment, or the appeal cannot be considered.[16] Where the record does not show the exact date of the entry of judgment, it will be presumed that it was entered before the judgment-roll was made up.[17] While a party entitled to written notice of the entry of a judgment may waive it, evidence of such waiver must appear from the record.[18]

Denial of new trial.—Where, under the former practice an appeal might be had from an order denying a new trial, the rule was that it must be determined upon the same record as that presented to the court below.[19] The appellant was required to furnish the court with the statement or affidavits, or both, which were used in the court below upon the hearing of the motion for a new trial.[20] Nevertheless, it has been held that where an appeal was taken from an order dismissing a motion for a new trial on the sole ground that the statement was not filed in time, no occasion existed to bring up the statement itself.[1] On appeal from an order granting or refusing a new trial, it is not necessary to prepare a new statement, for the original statement, with the judge's certificate as to documents and depositions not included therein, is sufficient.[2]

14. Todd v. Winants, 36 Cal. 129; McQuade v. Whaley, 29 Cal. 612.

15. Todd v. Winants, 36 Cal. 129.

16. Kimple v. Conway, 69 Cal. 71, 10 Pac. 189; Savings & Loan Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624; In re De Leon's Estate, 4 Cal. Unrep. 388, 35 Pac. 309; Weysan v. Chabrie, 2 Cal. Unrep. 508, 7 Pac. 634.

17. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294.

18. Hughes Mfg. & Lumber Co. v. Elliott, 167 Cal. 494, 140 Pac. 17; Hartfield v. Alderete, 25 Cal. App. 732, 145 Pac. 146.

19. Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535.

20. Bodley v. Ferguson, 25 Cal. 584.

1. Harper v. Minor, 27 Cal. 107.

2. Loucks v. Edmondson, 18 Cal.

III. CONTENTS OF JUDGMENT-ROLL.

§ 250. In General.—A judgment-roll is defined in section 670 of the Code of Civil Procedure and consists of the papers therein enumerated.[3] This section reads as follows:

"Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

"1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons;

"2. In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service, on such defendant; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons."[4]

This section contains all the essentials of the common-law record, omitting the formal parts, such as the placita, memorandum, continuances, and connecting links, some of which have been rendered unnecessary by changes in our proceedings.[5] It must be remembered that while this section prescribes what shall constitute the judgment-roll,

203, approved in Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135. For modern practice as to orders on new trial, see supra, § 34.

3. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

4. Code Civ. Proc., § 670, based on Practice Act, § 203.

5. Sawyer, J., concurring in Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

it does not prescribe what shall constitute the record on appeal.[6] The papers which constitute the judgment-roll in special proceedings, such as petitions in certiorari and mandamus, are treated in other articles.[7]

§ 251. Papers Improperly Submitted.—While the court is bound by the code declaration as to what constitutes the judgment-roll,[8] it is not bound by the actual papers submitted as a part of the roll.[9] The circumstance that papers not belonging to the judgment-roll are found commingled with or attached to other papers that do belong to it, creates no embarrassment. The case is one of mixture, not of fusion, and the papers not falling within the statute definition of "judgment-roll" must be treated as of no effect.[10] The judgment-roll does not depend upon the fact that the clerk has fastened certain papers together, nor do other papers which the clerk may have joined with those which the statute declares shall constitute the judgment-roll, become a part of the roll by reason of being so joined.[11] Upon an appeal from a judgment, an appellate court is therefore not bound by the papers found in the transcript which counsel claim constitute the judgment-roll, neither is it foreclosed by the certificate of the clerk of the trial court that certain papers therein enumerated form the judgment-roll. If opposing counsel contend that the judgment-roll presented is defective or lacking in material parts, he is entitled to bring such omitted documents, properly certified, before the appellate court, and then it becomes the duty of the court to determine, from all the record before it, what constitutes the

6. Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122. As to what constitutes the record on appeal, see supra, §§ 229–238.

7. See CERTIORARI; MANDAMUS, etc.

8. See supra, § 250.

9. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264; Sharp v. Daughney, 33 Cal. 505.

10. Sharp v. Daughney, 33 Cal. 505.

11. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

judgment-roll in the case.[12] Nevertheless it will be presumed, in the absence of a showing to the contrary, that the pleadings, order overruling the demurrer, minutes of the court, findings and judgment, contained in the transcript and mentioned in the certificate of the clerk attached thereto as being correct, constitute the judgment-roll; and it is not necessary that the certificate should also state that they constitute the judgment-roll.[13]

§ 252. Proof of Service.—Where a judgment is by default, "proof of service" is part of the judgment-roll.[14] In this connection it has been observed that there are two modes of obtaining jurisdiction over the person of a defendant: First, by personal service of the summons, with a copy of the complaint; second, by constructive service, or what is commonly designated publication of summons.[15] Proof of the former mode of service is the affidavit or certificate of the officer, if the service has been made by an officer, of the fact and the time and place of service; or the affidavit of a citizen, if service has been made by a citizen, showing that he is competent to make the service, and that he in fact made it by delivering to the defendant personally a certified copy of the summons and complaint, stating the time and place.[16] Proof of the latter mode is the affidavit of the printer, or his foreman or principal clerk, showing that publication has been made, stating where and how long, and an affidavit showing a deposit in the postoffice if such deposit was made;[17] and, also, since 1895, the affidavit of the party and the order of the court directing service by publication.[18]

12. Paige v. Roeding, 96 Cal. 388, 31 Pac. 264.

13. O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

14. Code Civ. Proc., § 670, subd. 1 (see supra, § 250); Barney v. Vigoureaux, 75 Cal. 376, 17 Pac. 433 (saying that "the affidavit or proof of service is a necessary part of the judgment-roll").

15. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. See PROCESS.

16. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

17. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Sharp v. Daughney, 33 Cal. 505.

18. See the next paragraph, this section, and cases cited thereto.

Affidavit and order for publication.—Originally, the judgment-roll did not include the affidavit of the party, and the order of the court directing service by publication.[19] The desirability of a change in the statute to include these papers was pointed out by the court in 1868.[20] The change was effected by the legislature in 1895 through a provision that the judgment-roll shall include "the affidavit for publication of summons and the order directing the publication of summons."[1]

Application of rule.—The statutory requirement that the judgment-roll include "proof of service" is applicable to the service of a cross-complaint.[2] It does not require, however, that the judgment-roll contain proof of an appearance,[3] of the service of amended pleadings,[4] or of the service of the notice of appeal.[5]

19. Lake v. Bonynge, 161 Cal. 120, 118 Pac. 535; People v. Mulcahy, 159 Cal. 34, 112 Pac. 853; Estate of McNeil, 155 Cal. 333, 100 Pac. 1086; People v. Davis, 143 Cal. 673, 77 Pac. 651; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698; People v. Temple, 103 Cal. 447, 37 Pac. 414; La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Sharp v. Daughney, 33 Cal. 505; McCauley v. Fulton, 44 Cal. 355. The same rule still seems to be applicable to judgments from courts of other states. McHatton v. Rhodes, 143 Cal. 275, 101 Am. St. Rep. 125, 76 Pac. 1036.

20. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, where the court said: "It would have added to the completeness of the record to have made the proof of service by publication include also the affidavit of the party, and the order of the court directing publication to be made, for in point of law they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

1. Stats. 1895, p. 45, amending Code Civ. Proc., § 670, subd. 1 (see supra, § 250); People v. Mulcahy, 159 Cal. 34, 112 Pac. 853; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698.

2. White v. Patton, 87 Cal. 151, 25 Pac. 270.

3. Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026; Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 891.

4. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027.

5. Peck v. Agnew, 126 Cal. 607, 59 Pac. 125.

§ 253. Pleadings Generally.—By the Code of Civil Procedure, the judgment-roll includes, in case the complaint is not answered by any defendant, "the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered,"[6] and in all other cases, "the pleadings."[7] For many purposes a bill of particulars, when made in response to a statutory demand, is an amplification of the complaint. Nevertheless, it is not a part of the judgment-roll.[8] Similarly, a complaint in intervention, which has not been finally disposed of, but which remains pending upon demurrer and motion to strike out, is not a part of the judgment-roll.[9] While under circumstances properly disclosed by the record it might appear that an amended pleading should not be considered nor treated as a pleading in the case, and hence, not a part of the judgment-roll, the presumption is that an amended pleading was duly filed and filed with the court's permission.[10]

Orders affecting pleadings.—The code provides that the judgment-roll shall include, in all cases where the complaint is answered, "all orders striking out any pleading in whole or in part, . . . and a copy of any order made on demurrer."[11] The provision that orders striking out pleadings shall constitute a part of the judgment-roll was added by an amendment in 1907.[12] Previously the California rule, established by a long line of judicial decisions,

6. Code Civ. Proc., § 670, subd. 1 (see supra, § 250).

7. Code Civ. Proc., § 670, subd. 2 (see supra, § 250); Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

8. Edelman v. McDonell, 126 Cal. 210, 58 Pac. 528.

9. People v. Union Bldg. & Loan Assn., 127 Cal. 400, 59 Pac. 692.

10. Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690 (citing Riverside Co. v. Stockman, 124 Cal. 222, 56 Pac. 1027).

11. Code Civ. Proc., § 670, subd. 2 (see supra, § 250; Overton v. Noyes, 177 Cal. 450, 170 Pac. 1110 (order striking out pleading); O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576 (copy of order made on demurrer).

12. Stockton Iron Works v. Walters, 18 Cal. App. 373, 123 Pac. 240, referring to Stats. 1907, p. 720.

was that motions and orders striking out pleadings did not constitute a part of the judgment-roll.[13] It still seems to be the California rule that the judgment-roll does not include an order allowing an amended complaint,[14] notice of the overruling of the demurrer to a complaint,[15] a motion for judgment on the pleadings,[16] or a notice of such motion.[17]

§ 254. Stricken or Superseded Pleadings.—The general rule in California seems to be that an original pleading, although stricken or superseded by an amended pleading, is nevertheless a part of the judgment-roll.[18] Even where an amended pleading has been filed, the original complaint,[19] the original demurrer,[20] and the original answer,[1] are still pleadings in the case, and therefore part of the judgment-roll. While it has been said in a number of cases that an amended pleading supersedes the original,[2] it has never been held that the original pleading

13. Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696; Barber v. Mulford, 117 Cal. 356, 49 Pac. 206; Sutton v. Stephan, 101 Cal. 545, 36 Pac. 106; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787; Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730; Douglas v. Dakin, 46 Cal. 49; Feely v. Shirley, 43 Cal. 369; Nevada County & Sacramento Canal Co. v. Kidd, 43 Cal. 180; Morris v. Angle, 42 Cal. 236; Sutter v. City and County of San Francisco, 36 Cal. 112; Dimick v. Campbell, 31 Cal. 238.

14. Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853; Carter v. Paige, 3 Cal. Unrep. 64, 20 Pac. 729.

15. Catanich v. Hayes, 52 Cal. 338.

16. Thornton, J., concurring in Hemme v. Hays, 55 Cal. 337; McAbee v. Randall, 41 Cal. 136.

17. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755.

18. Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811; Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635; Davis v. Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40; Abbott v. Douglass, 28 Cal. 295.

19. Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

20. Davis v. Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

1. Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811; Abbott v. Douglass, 28 Cal. 295.

2. Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40. See PLEADINGS.

is not a part of the judgment-roll.[3] While it can no longer be looked to for the issues to be tried or for admissions, yet in some respects it is still material, as in determining the time when the action was commenced.[4] Even an answer which is stricken out by order of the court is nevertheless entitled to its position in the judgment-roll.[5] Certain obiter expressions are to the effect, however, that a superseded pleading is no part of the judgment-roll.[6] Thus it has been said that where a complaint or answer is amended, only the amended pleadings or those on which the cause was tried form the "pleadings" which are part of the judgment-roll.[7] And where a demurrer to the original complaint had been sustained and the cause had been tried upon another complaint, it has been said that the original complaint may not be considered by the appellate court for any purpose.[8]

§ 255. Orders and Minutes.—In general, interlocutory orders and proceedings are not part of the judgment-roll.[9] And until a final judgment is rendered, the judgment-roll cannot be required to be made.[10] The judgment-roll does not include a minute order,[11] an order appointing a guardian ad litem,[12] an order disallowing a proposed intervention,[13] an order setting aside the defendant's

3. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

4. Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635.

5. Abbott v. Douglass, 28 Cal. 295.

6. Bray v. Lowery, 163 Cal. 256, 124 Pac. 1004; Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

7. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

8. Bray v. Lowery, 163 Cal. 256, 124 Pac. 1004.

9. Abbott v. Douglass, 28 Cal. 295; Harper v. Minor, 27 Cal. 107; Dietz v. Scott, 27 Cal. App. 320, 149 Pac. 775. As to orders affecting pleadings, see supra, § 253.

10. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

11. De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787; Brown v. Canty, 31 Cal. App. 183, 159 Pac. 1056.

12. Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754; Brady v. Page, 66 Cal. 232, 5 Pac. 103; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

13. Britt v. East Side Hardware Co., 25 Cal. App. 231, 143 Pac. 244.

default and judgment against him and restoring his answer to the files,[14] or a notice of a motion to dismiss.[15]

There is one important exception to the rule that interlocutory orders do not constitute a part of the judgment-roll, for the statute provides that the roll shall include a copy of any order "relating to a change of parties."[16] Consequently, the roll includes an order substituting a different person in place of the original plaintiff,[17] and an order directing that the names of two of the plaintiffs be stricken from the complaint.[18]

The minutes of the clerk or of the court are no part of the judgment-roll in California,[19] for they relate neither to an order striking out a pleading nor to one made on demurrer.[20] These entries are evidently intended for the guidance of the court in its further action in the cause, and cease to be of value upon the entry of judgment, and therefore cannot be used to impeach the record of the judicial action of the court.[1]

§ 256. Verdict and Findings.—The verdict of the jury constitutes a part of the judgment-roll.[2] Indeed, the code declares "a copy of the verdict of the jury" to be a part of the judgment-roll, in all cases except where the complaint is not answered by any defendant,[3] and there is no doubt that this language embraces the special verdicts which absolutely control the general verdicts.[4]

14. Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361.

15. Bacon v. Robson, 53 Cal. 399.

16. Code Civ. Proc., § 670, subd. 2 (see supra, § 250); Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; Harper v. Minor, 27 Cal. 107.

17. Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

18. Tormey v. Pierce, 49 Cal. 306.

19. Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109; People v. Empire Gold & Silver Min. Co., 33 Cal. 171; Harper v. Minor, 27 Cal. 107; Dawley v. Hovious, 23 Cal. 103; Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700.

20. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700.

1. Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

2. Goldman v. Rogers, 85 Cal. 574, 24 Pac. 782; Reynolds v. Harris, 8 Cal. 617.

3. Code Civ. Proc., § 670, subd. 2 (see supra, § 250).

4. California Wine Assn. v. Commercial Union Fire Ins. Co., 159 Cal. 49, 112 Pac. 858.

Similarly, the findings are a part of the judgment-roll in all cases except where the complaint is not answered by any defendant,[5] for the code provides that the roll shall include a copy of the "findings of the court or referee."[6] When the defendant does not answer the complaint, findings are not necessary, and if made, do not constitute part of the judgment-roll.[7]

When a case is tried by a referee, such papers and no others constitute the judgment-roll as would constitute it if the case had been tried by the court.[8] Where the report of an ordinary referee is simply a report of the testimony upon which the judge bases his findings it forms no part of the judgment-roll.[9] But where the finding of a referee is upon the whole issue under section 644 of the Code of Civil Procedure, it must stand as the finding of the court and judgment must be entered thereon. This is the finding referred to in section 670 of the Code of Civil Procedure.[10] Thus, the report of a referee upon the first order of reference is not a finding upon the whole issue, which must stand as the finding of the court, and is therefore not a part of the judgment-roll.[11]

§ 257. **Judgment.**—The code specifically provides that the judgment-roll shall include "a copy of the judg-

5. Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021 (findings of referee); Kimball v. Stormer, 65 Cal. 116, 3 Pac. 408 (findings of court); Thompson v. Patterson, 54 Cal. 542 (findings of referee); Harris v. San Francisco Sugar etc. Co., 41 Cal. 393 (findings of referee); Reynolds v. Harris, 8 Cal. 617 (findings of court).

6. Code Civ. Proc., § 670, subd. 2 (see supra, § 250).

7. Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403; Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37; In re Cook, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

8. Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021.

9. Harper v. Minor, 27 Cal. 107.

10. Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021; Thompson v. Patterson, 54 Cal. 542; Harris v. San Francisco Sugar etc. Co., 41 Cal. 393 (the ambiguous term, "report" the facts, used in the Practice Act was evidently intended for "finding or decision." In section 670 of the code the word "finding" was substituted for "report.")

11. Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021.

ment,"[12] and it will be observed, by reference to its provision, that a copy of the judgment is a part of the judgment-roll whether judgment is entered by default or after trial.[13] Indeed, the judgment-roll has been aptly called "the record of the judgment."[14] The "judgment," of which a copy is to be included in the "roll," is the judgment defined in section 577 of the Code of Civil Procedure as "the final determination of the rights of the parties in the action or proceeding."[15] Consequently, there can only be one judgment in the judgment-roll.[16] Where two judgments are tendered as part of the judgment-roll, the appellate court, in the absence of some further showing, will accept the later in point of time as the true judgment, on the presumption that the earlier judgment was set aside and the later judgment substituted for good reason by the court below.[17]

An agreed statement of facts, whether it constitutes a part of the judgment-roll or not, may be considered by the appellate court where the judgment recites that it is based on such statement and the statement is set out in full in the record.[18] Recitals in a judgment entered by the clerk are ordinarily immaterial, however, at least on direct appeal. They are not necessary to the judgment,

12. Code Civ. Proc., § 670, subds. 1, 2 (see supra, § 250).

13. Thomas v. Anderson, 55 Cal. 43.

14. Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

15. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

16. Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264.

17. Haese v. Heitzeg, 159 Cal. 569, 114 Pac. 816; Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Hawley v. Gray Bros. Artificial Stone Paving Co., 127 Cal. 560, 60 Pac. 437; Butler v. Soule, 124 Cal. 69, 56 Pac. 601; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264 (the leading case); Moore v. Mott, 4 Cal. Unrep. 269, 34 Pac. 345; Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; Moore v. Mott, 4 Cal. Unrep. 269, 34 Pac. 345.

18. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364.

are not ordered by the court, and are frequently but the clerk's exposition of events antedating the judgment.[19]

§ 258. Miscellaneous Matters. — Many miscellaneous papers have been held not to constitute parts of the judgment-roll. This conclusion has been reached in California with reference to instructions to the jury,[20] the oath or accounts of a receiver,[1] a petition and bond for the removal of a cause to the federal court,[2] a consent to a judgment,[3] a notice of intention to move for a new trial,[4] a judgment-roll in a former suit between the parties,[5] and proceedings upon a motion to vacate a judgment on the ground of the alienage of the judge.[6]

None of the evidence introduced upon the trial by either party is a part of the judgment-roll.[7] Neither is an affidavit of one of the attorneys, objecting to the selection of the jury, a part of the record, although it is copied into the transcript.[8]

Stipulations of the parties ordinarily constitute no part of the judgment-roll.[9] Nevertheless, where the parties

19. Lamet v. Miller, 2 Cal. Unrep. 679, 11 Pac. 744, citing Leese v. Clark, 28 Cal. 26.

20. Matthews v. Jones, 92 Cal. 563, 28 Pac. 597; Paris v. Raynor, 76 Cal. 648, 18 Pac. 788. See, however, Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101, where it is said that instructions refused by the court become a part of the judgment-roll when properly indorsed by the judge.

1. O'Neill v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576.

2. Rough v. Booth, 2 Cal. Unrep. 270, 3 Pac. 91.

3. Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

4. Cormond v. United Railroads, 41 Cal. App. 683, 183 Pac. 218; Skinner v. Horn, 146 Cal. 62, 79 Pac. 597; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Nye v. Marysville etc. St. R. Co., 97 Cal. 461, 32 Pac. 530; Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773 (where the court says: "Formerly the notice was part of the record on appeal, but by careless legislation it is no longer so"); Heine v. Treadwell, 72 Cal. 221, 13 Pac. 503; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Hook v. Hall, 68 Cal. 22, 8 Pac. 596.

5. Morris v. Angle, 42 Cal. 236.

6. Matter of Danford, 157 Cal. 425, 108 Pac. 322.

7. Brown v. Canty, 31 Cal. App. 183, 159 Pac. 1056.

8. Magee v. Mokelumne Hill Canal & Min. Co., 5 Cal. 258.

9. Spreckels v. Ord, 72 Cal. 86, 13 Pac. 158; Spinetti v. Brignardello, 53 Cal. 281; People v.

stipulate that the answer of a defendant to an amended complaint be his answer to the complaint when again amended, this stipulation becomes a part of the pleadings and is properly attached to the judgment-roll.[10]

Several California decisions state that a bill of exceptions is a part of the judgment-roll.[11] This has been true at various times under the Practice Act and the Code of Civil Procedure,[12] but has not been true since the amendment of section 670 in 1907.[13]

The reporter's phonographic transcript of the record, authenticated by the judge, is a part of the judgment-roll, however, under specific provision of the code.[14] The transcript so allowed and certified becomes a part of the judgment-roll only in the same sense that a bill of exceptions was formerly made a part thereof— that is, to serve as part of the record on appeal.[15]

IV. NECESSITY FOR OTHER RECORD THAN JUDGMENT-ROLL.

§ 259. General Rule.—The rule is well established in California that matters which are not part of the judgment-roll cannot be considered on appeal unless they are embodied in some other record, such as a bill of exceptions, statement or reporter's transcript,[16] notwithstand-

Hawes, 41 Cal. 632; O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576.

10. Kent v. San Francisco Sav. Union, 130 Cal. 401, 62 Pac. 620.

11. In re Robinson's Estate, 106 Cal. 493, 39 Pac. 862; Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876; Catanich v. Hayes, 52 Cal. 338; Packard v. Bird, 40 Cal. 378; Wetherbee v. Carroll, 33 Cal. 549; More v. Del Valle, 28 Cal. 170; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907.

12. From 1862 to 1872, by Practice Act, § 203; from 1872 to 1874, and from 1876 to 1907, by Code Civ. Proc., § 670.

13. Code Civ. Proc., § 670, as amended by Stats. 1907, p. 720; Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940.

14. Code Civ. Proc., § 953a; Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981.

15. Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940.

16. Neale v. Morrow, 174 Cal. 49, 161 Pac. 1165; Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870; Estate of Wells, 140 Cal. 349, 73 Pac. 1065; Bedan v. Turney, 99

ing there are included in the transcript certain exhibits and orders upon which reliance is made for a reversal of the judgment.[17] As early as 1868 it was said that this proposition had been announced over and over again, times almost without number.[18] Thus it has been said that when an appeal from a judgment is heard upon the judgment-roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. If that discloses error, the appellate court can no more assume that it was cured by some matter which does not appear therein, than it can consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. In each case the record must be judged by itself alone.[19] So, also, it has been said that when an appeal is to be determined upon the judgment-roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. If the error relied on to destroy such presumption consists in matters dehors the record, such matters must be brought to the appellate court by bill of exceptions or other appropriate method.[20]

§ 260. **Application Generally.**—The rule that matters which are not a part of the judgment-roll will not be reviewed on appeal unless they are presented by bill of exceptions, statement or other record,[1] has been applied to prevent the consideration of many matters, such as a

Cal. 649, 34 Pac. 442; Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861; McAbee v. Randall, 41 Cal. 136; Sutter v. City and County of San Francisco, 36 Cal. 112; Wetherbee v. Carroll, 33 Cal. 549; Bostwick v. McCorkle, 22 Cal. 669; Reynolds v. Lawrence, 15 Cal. 359 (where the statement omitted to specify the grounds of the appeal); Wilson v. Middleton, 2 Cal. 54; Brown v. Canty, 31 Cal. App. 183, 159 Pac. 1056; People v. Davis, 1 Cal. Unrep. 45. And see, generally, the cases applying this rule, §§ 260–263.

17. Brown v. Canty, 31 Cal. App. 183, 159 Pac. 1056.

18. Sutter v. City and County of San Francisco, 36 Cal. 112.

19. Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

20. Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411.

1. See supra, § 259.

request for the amendment of a pleading;[2] a declaration of counsel that an amended pleading was filed without leave of court;[3] a bill of particulars,[4] including a demand for such a bill;[5] a complaint in intervention which remains pending;[6] a petition and bond for removal of a cause to a federal court;[7] motions generally;[8] including a motion for judgment on the pleadings,[9] and a notice of such motion;[10] a notice of intention to move for a new trial;[11] and a notice of motion for relief from failure to file a statement on motion for new trial in time and a minute order granting such motion;[12] intermediate orders;[13] stipulations of the parties;[14] evidence;[15] questions of fact;[16] the minutes of the court during the trial;[17] the lower court's instructions to the jury;[18] including the objec-

2. Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113.

3. Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690.

4. Edelman v. McDonell, 126 Cal. 210, 58 Pac. 528.

5. Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467.

6. People v. Union Bldg. & Loan Assn., 127 Cal. 400, 59 Pac. 692.

7. Rough v. Booth, 2 Cal. Unrep. 270, 3 Pac. 91.

8. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299.

9. Thornton, J., concurring in Hemme v. Hays, 55 Cal. 337; McAbee v. Randall, 41 Cal. 136. See, however, Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302, holding that an erroneous ruling in rendering judgment on the pleadings without a trial of the action may be reviewed on appeal without being incorporated in a bill of exceptions when the judgment recites that it was rendered on the pleadings.

10. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755.

11. Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Skinner v. Horn, 146 Cal. 62, 79 Pac. 597; Nye v. Marysville etc. St. R. Co., 97 Cal. 461, 32 Pac. 530; Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Cormond v. United Railroads, 41 Cal. App. 683, 183 Pac. 218.

12. King v. Dugan, 150 Cal. 258, 88 Pac. 925.

13. See infra, § 261.

14. See infra, § 263.

15. See infra, § 262.

16. Gavin v. Phillips, 12 Cal. App. 34, 106 Pac. 424.

17. Dawley v. Hovious, 23 Cal. 103.

18. Matthews v. Jones, 92 Cal. 563, 28 Pac. 597; Goldman v. Bashore, 80 Cal. 146, 22 Pac. 82 (holding, further, that the fact

tion that instructions proposed by either party shall be handed to the judge personally and a copy thereof delivered to the adverse party;[19] an undertaking on attachment;[20] an undertaking on appeal;[1] the due appointment of a receiver and the acquisition of jurisdiction to order a receiver's sale;[2] a party's consent for the entry of judgment;[3] the evidence upon which a judgment of nonsuit was granted;[4] an adjudication of bankruptcy not an issuable fact in the case;[5] a former judgment which has been set aside;[6] or the authentication of the transcript.[7]

§ 261. Application to Intermediate Orders.—By application of the general rule that matters which are not a part of the judgment-roll will not be reviewed on appeal unless made a part of the record by bill, statement, or other means,[8] it follows that in the absence of such papers the appellate court will not review intermediate, non-appealable orders.[9] Thus it has been held that unless the order in question is incorporated into the record by proper means, the appellate court will not review an order allowing an amended complaint,[10] an order allowing a cross-

that the specification of errors at law at the end of the body of the statement reciting that "the court erred in instructing the jury as follows," and setting out the language of the instructions, is insufficient; Paris v. Raynor, 76 Cal. 648, 18 Pac. 788; Freeborn v. Norcross, 49 Cal. 313; Paige v. O'Neal, 12 Cal. 483; White v. Abernathy, Clark & Co., 3 Cal. 426.

19. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8.

20. Wheeler v. Farmer, 38 Cal. 203.

1. Los Angeles Nat. Bank v. Chandler, 7 Cal. Unrep. 340, 92 Pac. 872.

2. O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576.

3. Grant v. McArthur, 137 Cal. 270, 70 Pac. 88.

4. Nicholl v. Littlefield, 60 Cal. 238.

5. Goodhue v. Rice, 53 Cal. 302.

6. Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264.

7. Hecker v. Baker, 19 Cal. App. 667, 127 Pac. 654.

8. See supra, § 259.

9. Gilman v. Bootz, 80 Cal. 564, 22 Pac. 255; Haraszthy v. Horton, 46 Cal. 545; Gates v. Walker, 35 Cal. 289; Abbott v. Douglass, 28 Cal. 295; Harper v. Minor, 27 Cal. 107; Stone v. Stone, 17 Cal. 513.

10. Carter v. Paige, 3 Cal. Unrep. 64, 20 Pac. 829.

complaint,[11] an order dismissing a cross-complaint and directing a judgment to be entered for the plaintiff,[12] an order denying a continuance,[13] an order appointing a receiver,[14] an order setting aside a default,[15] or an order striking out a notice of motion for a new trial.[16]

Orders striking pleadings.—Prior to 1907 the rule was well settled that an appellate court would not review orders striking out pleadings in the absence of a bill of exceptions or statement.[17] It was immaterial that an order "striking out a pleading or a portion thereof," is deemed to be excepted to by code provision,[18] for an order which is not part of the judgment-roll, no matter how an exception to it may be taken, must be presented by a bill of exceptions,[19] and until 1907 an order striking out a pleading was not a part of the judgment-roll. Since 1907, however, "all orders striking out pleadings in whole or in part" have been part of the judgment-roll,[20] and it therefore would seem no longer necessary to present the matter by bill of exceptions, as was the case when such orders formed no part of the judgment-roll.[1]

11. Bell v. Southern Pacific R. Co., 144 Cal. 560, 77 Pac. 1124.

12. Stoddart v. Burge, 53 Cal. 394.

13. Jacks v. Buell, 47 Cal. 162; Robles v. Robles, 1 Cal. Unrep. 58.

14. O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576.

15. Grazidal v. Bastanchure, 47 Cal. 167.

16. Wilson v. Dougherty, 45 Cal. 34.

17. Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696; Barber v. Mulford, 117 Cal. 356, 49 Pac. 206; Sutton v. Stephan, 101 Cal. 545, 36 Pac. 106; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; Spence v. Scott, 97 Cal. 181, 31 Pac. 52, 939; Cheland v. Walbridge, 78 Cal. 358, 20 Pac. 730; Douglas v. Dakin, 46 Cal. 49; Feely v. Shirley, 43 Cal. 369; Nevada County & Sacramento Canal Co. v. Kidd, 43 Cal. 180; Morris v. Angle, 42 Cal. 236; Sutter v. City and County of San Francisco, 36 Cal. 112; Dimick v. Campbell, 31 Cal. 238.

18. Code Civ. Proc., § 647. See supra, § 96.

19. Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 371.

20. See supra, § 253.

1. Stockton Iron Works v. Walters, 18 Cal. App. 373, 123 Pac. 240.

§ 262. **Application to Evidence.**—The rule is well settled that an appellate court, in the absence of a bill of exceptions, statement or substitute therefor, will not consider the evidence adduced at the trial,[2] including evidence taken in a probate court.[3] Even the evidence in proceedings under an act allowing the lower court to grant a new trial without a bill of exceptions where a proposed statement or bill of exceptions was destroyed by fire[4] will not be reviewed on appeal without a bill of exceptions.[5] So, too, the appellate court, in the absence of a bill or statement, will not consider objections to the introduction or exclusion of evidence,[6] but will assume that all objections to evidence in support of the findings were waived.[7]

The same principle appears in the rule that a failure to find upon an issue, the finding upon which might have the effect of invalidating a judgment fully supported by the findings made, is not ground for reversal, unless it be shown by a statement or bill of exceptions that evidence was submitted in relation to the issue, sufficient to authorize such a finding as would have the effect to invalidate the judgment.[8] It appears also in the rule that the insufficiency of the evidence to support the findings will

2. State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Neale v. Morrow, 174 Cal. 49, 161 Pac. 1165; Sunrise Land Co. v. Root, 160 Cal. 95, 116 Pac. 72; Estate of Dean, 149 Cal. 487, 87 Pac. 13; Pereira v. City Sav. Bank, 128 Cal. 45, 60 Pac. 524; Tillman v. Averett, 82 Cal. 576, 23 Pac. 875; Estate of Arnaz, 45 Cal. 259; De Johnson v. Sepulbeda, 5 Cal. 149; Wilson v. Middleton, 2 Cal. 54; Pierce v. Minturn, 1 Cal. 470; Bunting v. Beideman, 1 Cal. 181; O'Connell v. Behan, 19 Cal. App. 111, 124 Pac. 1038; Love v. Watts, 1 Cal. Unrep. 24.

3. Estate of Arnaz, 45 Cal. 259.

4. Act of March 23, 1907 (Stats. 1907, p. 998).

5. Fisher v. Western Fuse & Explosives Co., 12 Cal. App. 299, 107 Pac. 332.

6. White v. White, 86 Cal. 219, 24 Pac. 996; Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111.

7. Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Poledori v. Newman, 116 Cal. 375, 48 Pac. 325.

8. John A. Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 Pac. 422; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

not be reviewed in the absence of a bill of exceptions,[9] and in the rule that the correctness of instructions will not be considered unless the evidence is set forth.[10]

§ 263. Application to Affidavits and Stipulations.— Since affidavits are not a part of the judgment-roll,[11] and since matters which are not included in the judgment-roll will not be considered on appeal unless they are made a part of the record by bill of exceptions, reporter's transcript, statement or similar means,[12] it follows that an appellate court, in the absence of a bill of exceptions, statement or reporter's transcript, will not consider the affidavits used in the lower court.[13] Thus, it will not consider, in the circumstances just stated, an affidavit of surprise,[14] an affidavit of newly discovered evidence,[15] an affidavit showing the prejudice of the judge,[16] nor affidavits supporting an application for an order of continuance.[17]

Similarly, since stipulations are not usually a part of the judgment-roll,[18] the appellate court will not ordinarily

9. Estate of Shirey, 167 Cal. 193, 138 Pac. 994; In re Brown's Estate, 143 Cal. 450, 77 Pac. 160; Pereira v. Wallace, 129 Cal. 397, 62 Pac. 61; O'Connell v. Behan, 19 Cal. App. 111, 124 Pac. 1038; Lewis v. City and County of San Francisco, 2 Cal. App. 112, 82 Pac. 1106.

10. California Cent. R. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599; Baldwin v. Bornheimer, 48 Cal. 433; Nelson v. Mitchell, 10 Cal. 92; White v. Abernathy etc. Co., 3 Cal. 426.

11. See supra, § 258.

12. See supra, § 259.

13. State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Estate of Dean, 149 Cal. 487, 87 Pac. 13; Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Clanton v. Coward, 67 Cal. 373, 7 Pac. 787; Welch v. Allen, 54 Cal. 211; Gordon v. Clark, 22 Cal. 533; People v. Honshell, 10 Cal. 83; Magee v. Mokelumne Hill Canal etc. Co., 5 Cal. 258; Gates v. Buckingham, 4 Cal. 286; Los Angeles Nat. Bank v. Chandler, 7 Cal. Unrep. 340, 92 Pac. 872.

14. Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377.

15. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 103 Pac. 320; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40.

16. Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43.

17. Robles v. Robles, 1 Cal. Unrep. 58.

18. See supra, § 258.

take into consideration stipulations of the parties unless they are incorporated into the record by a bill, statement or other means.[19] Nevertheless, where the parties recite in their stipulation all the facts in the case and agree that the stipulation shall be part of the judgment-roll, and that no statement on appeal shall be required, the facts therein recited take the place of findings and no other statement on appeal is required.[20]

§ 264. Matters Shown by Judgment-roll.—Where the whole case appears upon the record, no bill of exceptions or statement is required,[1] for the purpose of a bill of exceptions or a statement is to make that of record which would not be of record otherwise.[2] The section of the code, providing that on appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exception upon which the the appellant relies,[3] does not forbid the hearing of an appeal from a judgment unless there be a bill of exceptions, but only provides that the court shall be furnished with a copy of any bill of exceptions on which the appellant relies.[4] In this connection it must be remembered that the judgment-roll itself is a record for an appeal, and there may be no occasion for anything further to present the question raised.[5] Consequently, where the grounds for appeal appear in the judgment-roll, no bill of exceptions or statement of the case is required.[6] Neither is a bill of exceptions or state-

19. San Francisco Sav. Union v. Myers, 76 Cal. 624, 18 Pac. 686; Spreckels v. Ord, 72 Cal. 86, 13 Pac. 158; Spinetti v. Brignardello, 53 Cal. 281; People v. Hawes, 41 Cal. 632; Ritter v. Mason, 11 Cal. 214.

20. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

1. De Johnson v. Sepulbeda, 5 Cal. 149; In re Ling, 2 Cal. Unrep. 490, 7 Pac. 660.

2. See supra, §§ 231, 237.

3. Code Civ. Proc., § 950 (see supra, § 1).

4. Thompson v. Hancock, 51 Cal. 110.

5. Wetherbee v. Carroll, 33 Cal. 549. And see cases cited infra.

6. Estate of Broome, 162 Cal. 258, 122 Pac. 470; Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Jones v. City of Peta-

ment necessary where a conclusion of law is not legitimately drawn from a finding of facts;[7] or where the question is, Do the findings sustain the judgment?[8] or on an appeal from an order denying a motion to change the place of trial;[9] or on an appeal from an order refusing an injunction.[10] Similarly, a bill of exceptions is not necessary to show an exception taken to an order where a statement of the fact which raises the exception is included in the order.[11] Thus, on appeal from a judgment on account of the erroneous overruling of a demurrer, no bill of exceptions is necessary if the transcript contains the demurrer, the order of the court overruling it, and the judgment, in which is recited the demurrer, the ruling thereon, and the exception taken thereto.[12]

§ 265. Matters Shown Otherwise Than by Bill or Statement.—Reference to the cases cited in the preceding sections will show that the courts, in affirming the necessity of a record other than the judgment-roll, have usually declared in terms that a bill of exceptions or statement is necessary. It seems that such declarations mean no more than that some record other than the judgment-roll is required, bills and statements having been the only other record provided during the greater part of the judicial history of California.[13] It is clear that no bill of exceptions or statement of the case is required where a statutory sub-

luma, 36 Cal. 230; Solomon v. Reese, 34 Cal. 28; Hutton v. Reed, 25 Cal. 478. Upon an appeal from a justice's court on questions of law, which appear in the docket and papers sent up, there is no necessity for a statement. Southern Pacific R. Co. v. Superior Court, 59 Cal. 471.

7. Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861.

8. Thompson v. Hancock, 51 Cal. 110; Gavin v. Sullivan, 12 Cal. App. 34, 106 Pac. 424.

9. Pieper v. Centinila Land Co., 56 Cal. 173 (construing the effect of the amendment of 1874 to Code Civ. Proc., § 951).

10. Hunt v. Steese, 75 Cal. 620, 17 Pac. 920.

11. Lincoln v. Sibeck, 27 Cal. App. 61, 148 Pac. 967.

12. McEntee v. Cook, 76 Cal. 187, 18 Pac. 258.

13. As to what papers constitute the record, see supra, §§ 229–238.

stitute is duly provided, such as the clerk's transcript of the case under the original Practice Act,[14] the reporter's transcript of the case under the present provisions of the code,[15] or a statement on motion for new trial.[16] An affidavit, however, cannot be used to supply any matter which should have been presented in either a statement of the evidence or bill of exceptions.[17] Similarly, an allegation that the judge omitted to settle a statement submitted to him cannot be taken as a substitute for the statement, nor does it constitute a reason for reversing the judgment.[18] Furthermore, when the appeal is from an order denying a new trial and an order denying a motion to vacate the judgment, it is not necessary that the orders appealed from should be contained in any bill of exceptions or statement. Copies of the orders appealed from certified by the clerk, together with a copy of the notice of appeal, are all that are requisite to sustain the appeal from such orders. It may be that without a bill of exceptions or statement showing facts upon which error in making the order is apparent, the appellant is not likely to succeed upon his appeal, but this goes to the question of the merits of the appeal and does not warrant a dismissal.[19]

V. BILL OF EXCEPTIONS.

In General.

§ 266. Distinctions.—There is no difference in form and substance between a statement and a bill of exceptions when settled;[20] and whenever it is necessary

14. Ingraham v. Gildermester, 2 Cal. 161.

15. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981.

16. Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; Loucks v. Edmondson, 18 Cal. 203.

17. In re Connor, 128 Cal. 279, 60 Pac. 862; Balan v. National Union Fire Ins. Co., 19 Cal. App. 778, 127 Pac. 829.

18. Hoadley v. Crow, 22 Cal. 265.

19. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280.

20. Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; Witter v. Andrews, 122 Cal. 1, 54 Pac. 276; People v. Crane, 60 Cal. 279; Yates

for the ends of justice to do so, the appellate court will consider the expressions as synonymous.[1] Consequently, a document which is in fact a bill of exceptions may be so considered, although it is entitled a "proposed statement on appeal,"[2] or a "statement of the case."[3] Conversely, a document which is in fact a statement of the case, may be so considered although it is entitled a "bill of exceptions."[4] As the reason for this rule, it has been said that the legal effect of a document is to be determined upon a consideration of the matter which it contains, rather than by the name which is given to it, and the document is not to be disregarded merely upon the ground that it is erroneously entitled, or is without any title.[5] Where the document submitted, however, recites that it was prepared under the code provisions relating to reporter's transcripts, it would be flying in the face of the record to hold that it may be regarded as a bill of exceptions.[6]

The judgment-roll does not include bills of exception at the present time, although it did so from 1862 to 1874 and from 1876 to 1907.[7] An extract from the minutes of the clerk, signed by the judge in the course of the proceedings from day to day, is not a bill of exceptions.[8]

v. Smith, 40 Cal. 662; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297 (holding that a statement on motion for a new trial and a bill of exceptions may be incorporated in one paper without invalidating either); Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657; Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

1. Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063.

2. Witter v. Andrews, 122 Cal. 1, 54 Pac. 276; People v. Crane, 60 Cal. 279.

3. Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657. Compare with Hook trial on the ground that notice v. Hall, 68 Cal. 22, 8 Pac. 596, holding that a portion of a statement in which the plaintiff reserves the right to object and except to the defendant's motion for a new of such motion was not filed in time cannot be treated as in the nature of a bill of exceptions when the facts are not set out.

4. Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063.

5. Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657.

6. Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299.

7. See supra, § 258.

8. Haraszthy v. Horton, 46 Cal. 545.

The certificate of the judge who tried the cause, made eight years after the trial, to the effect that he believed the exceptions taken were correctly noted in the clerk's minutes, cannot supply the place of a bill of exceptions.[9]

§ 267. Purpose.—The purpose of a bill of exceptions is to preserve a record of the rulings and decisions of the lower court for the benefit of the appellate tribunal;[10] or, in other words, to make a record of that which without it would not constitute a part of the record.[11] By such action, matter which is not record by the general law attains the sanction and verity which enables the revising court to consider it.[12] Bills of exception were unknown to the common law, and were created by a statute of 13 Edw. I to enable appellate courts to review errors in law which did not appear on the face of the record.[13] Under the Practice Act, bills of exceptions were used only on appeals from judgment, and could not be used on appeals from orders. Under the Code of Civil Procedure, however, bills of exception are equally applicable to any and all kinds of appeals, including appeals from final judgments and appeals from orders granting a new trial.[14] Thus it has been said that upon an appeal from an order striking out affidavits for a motion for a new trial, the aggrieved party is entitled to a bill of exceptions presenting the proceedings and rulings of the lower court in such shape that the action of such court may be reviewed by the appellate tribunal.[15] So, also, it has

9. Castro's Exrs. v. Armesti, 14 Cal. 38.

10. Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; In re Moore, 78 Cal. 242, 20 Pac. 558.

11. Miller v. Lux, 100 Cal. 609, 35 Pac. 345; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; People v. Judge of Tenth Judicial District, 9 Cal. 19; Parsons v. Davis, 3 Cal. 421; In re Ling, 2 Cal. Unrep. 490, 7 Pac. 660.

12. Parsons v. Davis, 3 Cal. 421.

13. 2 Ruling Case Law, p. 140.

14. See supra, 232.

15. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

been held that a bill of exceptions may be used to review a ruling of the lower court as to costs,[16] or a ruling on a motion for a nonsuit,[17] or a ruling made during the trial of an issue of law.[18] There is no statutory requirement that a bill of exceptions shall specify the purpose for which it is prepared or settled, and the document when settled is therefore available for any purpose authorized by the code.[19] It is to be observed, however, that a bill of exceptions prepared by one codefendant who has not appealed cannot be used by his codefendant.[20]

Matters to be Included.

§ 268. In General.—When a bill of exceptions is necessary, it must always contain a statement of the facts which will authorize the appellate court to review the action of the court below.[1] With reference to the contents of the draft of the bill of exceptions which must be submitted by the party desiring to have a bill settled, the Code of Civil Procedure contains the following provisions:

"Such draft must contain all the exceptions and proceedings taken upon which the party relies, and may contain all matters reviewable on the same appeal whether occurring at the trial or on motion for a new trial. It may also contain a statement of any matters occurring upon the trial, in the presence of the court, showing any of the matters mentioned in subdivisions one and two of section six hundred fifty-seven of this code."[2]

16. Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080.

17. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

18. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40 (citing Tregambo v. Comanche M. Co., 57 Cal. 501, and saying that the word "trial," as used in Code Civ. Proc., § 650, means a trial of an issue of law as well as the trial of an issue of fact).

19. Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657.

20. Houghton v. Trumbo, 103 Cal. 239, 37 Pac. 152.

1. Lamet v. Miller, 2 Cal. Unrep. 679, 11 Pac. 744.

2. Code Civ. Proc., § 650 (in part). Subdivisions 1, 2, of the Code Civ. Proc., § 657, relate to ir-

Nevertheless, it must be remembered that a bill of exceptions is only necessary to place that on the record which, without it, does not go on the record.[3] That which is a record already cannot receive a higher degree of sanction by being made a record a second time.[4] Consequently, items which are already a matter of record, such as pleadings and judgment which constitute a portion of the judgment-roll, should be excluded from the bill of exceptions.[5] Thus on an appeal from a judgment, neither the findings of fact and conclusions of law, nor the decree entered thereon, nor the notice of appeal, with proof of service, nor the recital that a sufficient undertaking on appeal had been filed with the clerk, can be properly included in a bill of exceptions. The two first are already matters of record, and do not need the authentication of the judge in a bill of exceptions in order to have them considered upon appeal; and the notice of appeal and undertaking on appeal are made subsequent to the matter appealed from, and can in no way have affected the action of the court.[6] An original complaint, however, although superseded by amended complaints, is properly brought up by a bill of exceptions, since it is a document on file in the action.[7]

Furthermore, it is not the purpose of a bill to include errors committed in favor of the prevailing party.[8]

§ 269. **Exceptions Taken.**—A bill of exceptions has always been a well-known means of preserving exceptions.[9] Indeed, statements of facts in a bill of exceptions

regularity in the proceedings and misconduct of the jury.

3. Parsons v. Davis, 3 Cal. 421 (holding that the judgment in another action may be brought up by certiorari and need not be included in a bill of exceptions); In re Ling, 2 Cal. Unrep. 490, 7 Pac. 660.

4. Parsons v. Davis, 3 Cal. 421.

5. In re Robinson, 106 Cal. 493, 39 Pac. 862. See supra, § 264.

6. White v. White, 112 Cal. 577, 44 Pac. 1026.

7. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

8. Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876.

9. Brandt v. Clark, 81 Cal. 634, 22 Pac. 863. See supra, §§ 95–100.

are made only to explain the exceptions which it shows were taken.[10] To challenge a ruling of the lower court, the bill of exceptions must affirmatively show, by statement in the substantive part of the bill, that the ruling assigned as error actually took place at the trial and was excepted to.[11] Thus, on appeal from a judgment on the pleadings, the bill of exceptions must show that the appellant excepted to the order granting the motion for judgment, or that he was absent from court when the order was granted, in which case the order is deemed to have been excepted to.[12] Furthermore, to make an exception effectual in a bill of exceptions, the objection should be stated, and also the ground upon which it is made. If it was made upon the ground that the evidence was insufficient to sustain the decision, the deficiencies of the evidence should be specifically stated. The mere statement in a bill of exceptions, that a party excepted to a decision of the court, unaccompanied by the objection and the grounds—whether of law or of fact—upon which it was made, does not constitute an exception upon which any question involved is examinable by the appellate court.[13] Nevertheless, in the preparation of a bill of exceptions, only such errors as the moving party deems essential to present his grounds of reversal, and so much of the evidence as is necessary to explain them, are to be included.[14]

§ 270. **Evidence Generally.**—Alleged error in excluding evidence can be reviewed upon a bill of exceptions as well as upon a motion for a new trial,[15] and a bill of exceptions has always been a well-known means of bring-

10. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

11. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Craig v. Hesperia Land & W. Co., 107 Cal. 675, 40 Pac. 1057. See supra, § 95.

12. Lamet v. Miller, 2 Cal. Unrep. 679, 11 Pac. 744.

13. Estate of Page, 57 Cal. 238. As to necessity for objections, see supra, §§ 74–94.

14. Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876.

15. Walls v. Preston, 25 Cal. 59.

ing up the evidence on appeal.[16] Indeed, the statute plainly requires that the bill, when it sets forth exceptions to a verdict or other decision, upon the ground of insufficiency of the evidence to justify it, must state the objection with so much of the evidence or other matter as is necessary to explain it, and no more.[17] The actual evidence should be brought up in the bill of exceptions, rather than the judge's conclusions from it,[18] but the testimony should be reduced to proper form.[19] If the bill refers to a deed printed in the transcript, the deed must be identified in the bill.[20] If the respondent interferes to deprive the appellant of the power of furnishing the required evidence by losing or destroying a document, the facts in regard to the document, the respect in which it is deemed material, and its importance in determining the issues in the case should be stated as far as possible.[1]

Evidence not presented below.—Only such evidence can be inserted in the bill of exceptions as was heard by the trial court, or was offered and excluded. To permit an appellant to insert in his bill of exceptions any matter of evidence not actually heard by the lower court would work great injustice both to the court and to the opposite party. It would present to the appellate court a case which might be entirely different from the one presented to and decided by the court below. Consequently, papers which were not put in evidence in the trial court cannot be considered on appeal although they are included in a bill of exceptions and although they were referred to and commented upon at the trial.[2] In this connection, it has been held that a bill of exceptions which says that a paper was offered in evidence does not show that the paper was

16. Brandt v. Clark, 81 Cal. 634, 22 Pac. 863.

17. Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890, referring to Code Civ. Proc., § 649.

18. Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247.

19. See infra, § 271.

20. Canfield v. Thompson, 49 Cal. 210.

1. Crooks v. Superior Court, 136 Cal. 23, 68 Pac. 96.

2. In re Moore, 78 Cal. 242, 20 Pac. 558.

read in evidence.[3] Nevertheless, a statement in a bill of exceptions that a writing was offered in evidence, and that an objection was interposed and overruled, is equivalent to a statement that the writing was admitted in evidence, although a direct statement would be more satisfactory.[4]

§ 271. **Reduction of Testimony.**—In setting forth the evidence in a bill of exceptions, two things are to be avoided. The first is making the bill merely a copy of the reporter's transcript, without any effort to reduce the testimony to proper form for the purpose of presenting the questions involved.[5] The second is making it a mere skeleton, so bald that it cannot in any true sense be regarded as a bill.[6] In either case, settlement of such a bill may be refused and the bill returned for correction.[7]

It is a rule which should, so far as possible, be followed in making up a bill of exceptions to make as short and succinct a statement of the evidence as possible, either in narrative form, giving its substance, or by stating what the evidence tended to establish.[8] Nevertheless, there are frequent instances where neither of these methods is wholly appropriate and adequate to express exactly what a witness has said. In such case it becomes necessary to state the evidence by question and answer, although not strictly required for the purpose of pointing an exception, but to lay before the court the exact statement of the witness.[9] In attempting to reduce

3. Page v. O'Brien, 36 Cal. 559.

4. Montgomery v. Donnelly, 57 Cal. 68. See supra, § 87.

5. Cohen v. Wallace, 107 Cal. 133, 140 Pac. 101; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Valleau v. Superior Court, 62 Cal. 290; People v. Sprague, 53 Cal. 422; Caldwell v. Parks, 50 Cal. 502; People v. Getty, 49 Cal. 581.

6. Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101; Sansome v. Myers, 77 Cal. 353, 19 Pac. 577; People v. Sprague, 53 Cal. 422.

7. See infra, § 301.

8. Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101; People v. Getty, 49 Cal. 581.

9. Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101, per Van Fleet, J.

the testimony to narrative form, every lawyer, even the most experienced, is liable to err on one side or the other, and usually his error is in the direction of unnecessary prolixity.[10]

§ 272. **Miscellaneous Matters.**—In a number of cases the California courts have passed upon the inclusion of miscellaneous matters in bills of exception. Thus they have held that upon an appeal from an election contest, the appellant must include in his bill of exceptions all the errors of the court below upon which he relies for reversal.[11] Only the ballots specifically objected to in the bill of exceptions can be considered.[12] Again, upon an appeal from an order striking out affidavits supporting a motion for a new trial, the affidavits stricken out would necessarily constitute the most material part of such a bill of exceptions.[13] So in a bill of exceptions to an order denying a continuance, it is not sufficient to present the alleged error in denying the continuance, unless it contains the affidavits used on the hearing of the motion.[14] Furthermore, instructions of the lower court to the jury, if erroneous, constitute "error at law occurring at the trial," and should be embodied in the bill of exceptions.[15]

Nevertheless, where an alleged departure from the due and orderly method of disposition of an action is not evidenced by a ruling or order that may be made the subject of an exception, an attempted statement of the error is not within the proper scope of a bill of exceptions.[16] On an appeal from a judgment, the bill should not include matters occurring subsequent to the date of the judg-

10. Sansome v. Myers, 80 Cal. 483, 22 Pac. 212 (per Beatty, C. J., concurring).

11. People v. Campbell, 138 Cal. 11, 70 Pac. 918.

12. Patterson v. Hanley, 136 Cal. 265, 68 Pac. 821.

13. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

14. Haraszthy v. Horton, 46 Cal. 545.

15. Southern Pac. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627.

16. Wagner v. Meinzger, 59 Cal. Dec. 424, 189 Pac. 435 (signing findings of fact and conclusions of law without reading them).

ment; but the recital of such matters is not prejudicial, since they will be disregarded in the disposition of the appeal.[17]

Reference should be made to later portions of this article for the rules that the bill should include assignment and specification of errors,[18] and affidavits, documents, papers and other matter which require identification and authentication.[19]

Authentication by party.—A bill of exceptions must be authenticated in some form, either by the signature or the indorsement of the attorney, or of the party, if he appear in person. A proposed draft, unless it shows upon its face or by proper indorsement that it is prepared by a party to the cause, is only waste paper, and no one need notice it.[20]

Settlement in General.

§ 273. Proceedings for Settlement.—Proceedings for the settlement of a bill of exceptions are "proceedings in an action."[1] The rule in respect to the preparation and settling of bills of exception is similar to that which prevails in reference to statements on appeal and on motion for new trial.[2] Illustrative cases on the settlement of statements on appeal are cited in the following sections; and cases involving the preparation of statements on motion for new trial will be found in another article in this work.[3] Parties making a bill of exceptions in order to comply with rule XXIX of the supreme

17. Holland v. Superior Court, 169 Cal. 361, 146 Pac. 878.

18. See infra, § 406 et seq.

19. See infra, §§ 325, 328.

20. Landers v. Lawler, 84 Cal. 547, 24 Pac. 307.

1. Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682 (holding that an application to amend or correct a settled bill must be made within the period of limitation prescribed by Code Civ. Proc., § 473); Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Lukes v. Logan, 66 Cal. 33, 4 Pac. 883.

2. Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751.

3. See NEW TRIAL.

court may follow the practice prescribed by sections 650 and 651 of the Code of Civil Procedure.[4]

Service of settled bill.—Under section 650 of the Code of Civil Procedure, as amended in 1907, it was required that a bill of exceptions, "upon being certified, must within five days thereafter be served upon the adverse party."[5] This provision may have been merely directory,[6] and was certainly inapplicable if no amendments to the original bill were ever proposed,[7] either through no amendments being proposed or through acceptance of the amendments by the person proposing the bill.[8]

§ 274. Service of Draft.—Under section 650 of the Code of Civil Procedure, the draft of a bill of exceptions, or a copy thereof, must, within ten days after notice of entry of judgment, be served upon the adverse party.[9] No doubt the phrase "adverse party" is to be given the same interpretation when applied to the service of bills of exception as is given when it is applied to the service of notice of appeal;[10] that is, it must be served upon every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken.[11] Consequently, it has been held that a bill of exceptions to an order dismissing

4. Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863.

5. Code Civ. Proc., § 650, as amended by Stats. 1907, p. 541.

6. Regents of University of California v. Turner, 159 Cal. 541, Ann. Cas. 1912C, 1162, 114 Pac. 842.

7. Regents of University of California v. Turner, 159 Cal. 541, Ann. Cas. 1912C, 1162, 114 Pac. 842; Broaddus v. James, 13 Cal. App. 478, 110 Pac. 164.

8. Broaddus v. James, 13 Cal. App. 478, 110 Pac. 164.

9. Estate of Young, 149 Cal. 173, 85 Pac. 145.

10. Estate of Young, 149 Cal. 173, 85 Pac. 145. As to the "adverse parties" on whom a notice of appeal is to be served, see supra, § 120.

11. Estate of Young, 149 Cal. 173, 85 Pac. 145 (quoting from Senter v. De Bernal, 38 Cal. 637, a case involving the service of notice of appeal).

petitions for partial distribution by children not provided for in a will must be served on the devisees named in the will who appeared and opposed the petition.[12]

A failure to serve adverse parties does not require or authorize the judge to refuse to settle the bill,[13] nor does it affect the jurisdiction of the appellate court to consider the appeal.[14] If it appears to the appellate court that the matters presented cannot be considered by reason of failure to serve adverse parties, their rights can be protected.[15] To do this, it is not necessary to dismiss the appeal, but merely to refuse to consider the bill of exceptions,[16] or to consider it and to modify the judgment in so far as it may be modified without impairing the rights of the parties not served.[17]

The service of a bill of exceptions by delivery to an express company for transmission to the attorney of the adverse party in another city constitutes "personal service." The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service.[18]

§ 275. Proposal of Amendments.—The code provides that the adverse party, within ten days after the service of the draft of a proposed bill of exceptions, "may propose amendments thereto, and serve the same or a copy thereof upon the other party."[19] Where an appeal is taken from a decision made before the settlement of a bill of exceptions, the allowing of an amendment to the

12. Estate of Long, 149 Cal. 173, 85 Pac. 145.

13. Estate of Young, 149 Cal. 173, 85 Pac. 145; Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935.

14. Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542; Estate of Young, 149 Cal. 173, 85 Pac. 145.

15. Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935.

16. Estate of Young, 149 Cal. 173, 85 Pac. 145.

17. Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542.

18. Kramm v. Stockton Electric R. R. Co., 22 Cal. App. 737, 136 Pac. 523.

19. Code Civ. Proc., § 650.

bill, by the insertion of specifications of the particulars in which it is claimed that the findings and decree of the court are not sustained by the evidence, is proper, as the effect of the amendment is simply to enable the appellate court to review the decision of the trial court, in view of all the facts which the trial court had before it when it made such decision.[20] On the other hand, a bill of exceptions on motion for a new trial cannot be amended by the respondent after the trial court has passed upon and denied the appellants' motion for a new trial.[1] The appeal deprives the superior court of jurisdiction to set aside its order denying the new trial, and while that order is in force the record upon which it is based cannot be changed. The appellate court must review the order upon the same record upon which it was made.[2] It will not be presumed on appeal that amendments were proposed to the draft of a bill of exceptions.[3] Nevertheless, it may be noted that the judge is not precluded from making the bill conform to the facts by reason of the failure on the part of the opposite party to propose such amendments to the draft as will cause the same to correctly represent what transpired before him.[4]

§ 276. **Presentation for Settlement.**—Within ten days after the service of the amendments, the proposed bill and amendments must be presented by the party seeking the settlement of the bill to the judge, or be delivered to the clerk of the court for the judge.[5] It is necessary for the party seeking the settlement of the bill of exceptions—in other words, the party taking the appeal and desiring and intending to use such bill in support of his appeal—

20. Estate of Lamb, 95 Cal. 397, 30 Pac. 568.

1. Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; Baker v. Borello, 136 Cal. 160, 68 Pac. 591.

2. Baker v. Borello, 131 Cal. 615, 63 Pac. 914.

3. McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521.

4. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

5. Code Civ. Proc., § 650.

to present the bill, with any amendments proposed thereto, to the judge who tried the case, or to the clerk for the judge, for settlement.[6] This presentation must be made within the time required by law, or settlement cannot be required.[7] The mere delivery of the bill to the judge pending the time allowed by law or by the stipulation of the parties within which amendments might be proposed and before the same had been proposed, there being no agreement by the parties that the bill might be so presented, would not be a presenting of the bill to the judge for settlement, for, in such case, the judge would have no legal right to fix or designate a day for its settlement or to settle it.[8] In fact, the burden is cast upon the proponents of a bill of exceptions to bring it to hearing and determination even after they have left it with the clerk for the judge,[9] for the judge is not required to act in the premises until requested to do so by one of the parties to the suit, and although it would be competent for either party to obtain from him an order fixing the day for settlement, the prevailing party is under no obligation to take any step in aid of the other party.[10]

§ 277. Necessity for Judge's Signature.—A bill of exceptions does not become effective until it is settled by the judge,[11] and a bill which is not authenticated in any manner cannot be considered on appeal.[12] Indeed, a bill of exceptions is not really settled until it has been certified to as correct.[13] Prior to the adoption of the code it was said that a bill of exceptions should be signed by

6. Harbaugh v. Lassen Irrigation Co., 24 Cal. App. 773, 142 Pac. 847.

7. See infra, § 283 et seq.

8. Harbaugh v. Lassen Irr. Co., 24 Cal. App. 773, 142 Pac. 847.

9. Slye v. Hunt, 29 Cal. App. 117, 154 Pac. 607; Miller v. Queen Ins. Co., 2 Cal. App. 267, 83 Pac. 287.

10. Miller v. Queen Ins. Co., 2 Cal. App. 267, 83 Pac. 287.

11. Bedau v. Turney, 99 Cal. 649, 34 Pac. 442.

12. Brode v. Gosslin, 16 Cal. App. 632, 117 Pac. 778.

13. Hought v. Superior Court, 128 Cal. 352, 60 Pac. 972.

the judge, or agreed to by the parties,[14] but the code requires that the bill be settled by the judge who presided at the trial, instead of by agreement of the parties.[15] Nevertheless, it seems that a party may, by stipulation, waive the signature of the judge or referee.[16] It must appear from the record, therefore, that the bill of exceptions was settled and signed by the judge who tried the case, or was concurred in by stipulation of the parties.[17]

Settlement by the clerk is insufficient,[18] for his statement in respect to the decisions of the court is entirely uncalled for by the statute, and cannot be regarded. If parties wish to bring the rulings of the court during the progress of a trial under review, they must take some other course than leaving it to the clerk to ascertain and settle what such rulings were.[19]

When the decision excepted to is made by a tribunal other than a court,[20] or is made by a judicial officer other than a judge,[1] the bill of exceptions is to be presented to and settled and signed by such tribunal or officer.

§ 278. **Proper Judge to Sign.**—The Code of Civil Procedure contains the following provision:

"A judge or judicial officer may settle and sign a bill of exceptions after, as well as before, he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct."[2]

14. De Johnson v. Sepulbeda, 5 Cal. 149.

15. Gee v. Terrio, 55 Cal. 381.

16. Sarver v. Garcia, 49 Cal. 218.

17. Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524.

18. Castro's Exrs. v. Armesti, 14 Cal. 38; Pierce v. Minturn, 1 Cal. 470; Gunter v. Geary, 1 Cal. 462.

19. Gunter v. Geary, 1 Cal. 462.

20. Code Civ. Proc., § 649.

1. Code Civ. Proc., §§ 649, 653.

2. Code Civ. Proc., § 653. A rule of the supreme court now provides as follows: "When the judge before whom an action was tried is dead, or has been removed from office, or resigns, any unsettled bill of

The provision that the judge may settle a bill of exceptions after he ceases to be a judge has been held constitutional as against the objection that it confers the power to do a judicial act upon one who is no longer a judicial officer,[3] since this power has been repeatedly recognized by the California courts.[4] Indeed, it has been said that where a bill of exceptions, instead of being settled by the judge who tried the case, is settled by his successor, it cannot be considered by the appellate court.[5] Nevertheless, one who has ceased to be a judge cannot be compelled to settle a proposed bill.[6] And a judge, after the expiration of his term, is utterly without power to make an order in diminution of the record, as by adding specifications of error to a settled bill, even by stipulation of the counsel for the parties.[7]

Settlement by several judges.—Where different judges act during the progress of a cause, it is the duty of the litigant desiring to have a ruling or decision reviewed upon appeal to present a bill of exceptions embodying the matters excepted to before one of the judges to the judge who made the ruling or decision for settlement by him, either at the time of the ruling, or after judgment; and, in such case, two or more bills of exceptions may be settled and properly presented for consideration upon ap-

exceptions, or uncertified record under section 953a of the Code of Civil Procedure, may be settled and certified by his successor in office; or, if he be disqualified, by a judge of the same or an adjoining county. And when the judge before whom an action was tried becomes disqualified, or is absent from the state, such bill of exceptions or statement may be settled and certified before a judge of the same or an adjoining county." Rule XXVII, 177 Cal. xliii, 176 Pac. vii.

3. Miller & Lux v. Enterprise Canal & Land Co., 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 700.

4. Miller & Lux v. Enterprise Canal & Land Co., 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 700; Leach v. Aitken, 91 Cal. 484, 28 Pac. 777; Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796.

5. People v. Knoblock, 11 Cal. App. 333, 104 Pac. 1012. (This was a criminal case; the rule now seems to be otherwise by reason of rule XXVII of the supreme court.)

6. See infra, § 298.

7. Kurtz v. Cutler, 178 Cal. 178, 172 Pac. 590.

peal.[8] In this connection it should be observed that where the successor of the judge who tried an action denies a motion for a new trial, a bill of exceptions on an appeal from the order denying the motion should be settled by the judge who made the order, and not by his predecessor who tried the action.[9] The underlying thought seems to be that it is the duty of a litigant desiring to have a ruling or decision reviewed, to present the bill of exceptions, embodying the matters excepted to, to the judge who made the ruling or decision for settlement by him. That judge alone can know the facts upon which he exercised his judgment, and, therefore, he alone, under our system, can properly settle the bill,[10] except where some disqualification or disability under the statute exists.

§ 279. **Effect of Settlement.**—When a bill of exceptions has been settled and allowed by the judge before whom the proceedings were had, it must for all purposes of reviewing the action of the lower court, be deemed by the appellate court to be a correct statement of what took place.[11] It must be assumed that the judge, in settling the bill, has caused to be inserted therein all matter which is relevant to a ruling to which exception has been taken, or will explain the same.[12] Consequently, the appellate court must treat the summary of the evidence set forth in the certified bill as a correct statement,[13] and it will not entertain proceedings to amend a bill which has been certified and engrossed.[14] Similarly, facts stated in a settled bill of exceptions must be accepted as true, for the

8. Turner v. Hearst, 115 Cal. 394, 47 Pac. 129.

9. Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796.

10. Turner v. Hearst, 115 Cal. 394, 47 Pac. 129, per Henshaw, J.

11. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

12. Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

13. Estate of Marre, 127 Cal. 128, 59 Pac. 385.

14. Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092; Mendocino County v. Peters, 2 Cal. App. 24, 82 Pac. 1122.

purposes of the appeal.[15] Whether or not the bill has been correctly engrossed so as to embody all that the judge at the time of the actual settlement ordered incorporated in it, is a matter to be determined at the time the engrossed bill is presented for certification;[16] and the judge's certification of the same is a determination that it is correctly engrossed.[17]

Nevertheless, where an opinion of the lower court is contained in a bill of exceptions, it only settles the fact that such opinion was rendered and filed, and cannot be regarded as determining that the recitals contained in it are true.[18] Furthermore, a stipulation agreeing to a bill of exceptions, signed by the attorney for certain defendants does not bind other defendants, although the judge, in allowing the bill, certifies that it was "agreed to by the respective attorneys." This statement merely means that it was agreed by the parties whose attorneys signed the stipulation.[19] It should not be understood that everything that is contained in a bill of exceptions is always to be considered by an appellate court in reviewing the action of the court below. It may frequently happen that irrelevant matters are incorporated in the bill, and the bill itself may show upon its face that the matters therein recited were not presented to the court at the time it made its rulings, or could not have any weight in determining the correctness of such rulings. The appellate court will consider only such matters as by the bill of exceptions itself purport to be pertinent, and to have been considered by the court below.[20]

15. Estate of Marre, 127 Cal. 128, 59 Pac. 385.

16. Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; Ryer v. Rio Land etc. Co., 147 Cal. 462, 82 Pac. 62.

17. Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866 (holding that an omission cannot be corrected by the appellate court, nor by the trial court after the six months' period allowed by Code Civ. Proc., § 473).

18. Estate of Kingsley, 93 Cal. 576, 29 Pac. 244.

19. People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481.

20. Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247; Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

Notice to Adverse Party.

§ 280. **When Necessary.**—The Code of Civil Procedure contains the following provision with respect to notice of settlement:

"The proposed bill and amendments must, within ten days [after service of the proposed amendments] be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge."[1]

There may be some confusion or contradiction in the terms of this section, but upon the point that the adverse party is to have notice of the proceedings to settle the bill there is no doubt. This requirement is not simply directory.[2] Indeed, where the papers are presented to the judge, rather than delivered to the clerk, notice to the adverse party is as necessary as the presentation of the bill to the judge.[3] If proper notice has not been served on the adverse party, the judge need not settle the bill,[4] for no judge is authorized to settle or certify to a bill of exceptions without the presence of or notice to the opposite party.[5] If he does so, it is error,[6] and the bill will not be considered on appeal.[7] The requirement of notice applies to proceedings under the new method of appeal, although no service of the notice of appeal is required;[8] but it does not apply if the proposed bill and amendments are delivered to the clerk for the judge under the alternative procedure stated in the code provision just quoted,

1. Code Civ. Proc., § 650.
2. Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 10 Pac. 946.
3. Witter v. Andrews, 122 Cal. 1, 54 Pac. 276.
4. Gallarde v. Atlantic & Pacific Telegraph Co., 49 Cal. 510.
5. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.
6. Witter v. Andrews, 122 Cal. 1, 54 Pac. 276.
7. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 10 Pac. 946.
8. Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 10 Pac. 946.

nor in certain other circumstances.[9] An affidavit that the affiant left a true copy of the notice at the office of the attorneys of the adverse party does not prove the service of such notice, in the absence of a showing of compliance with all the requirements of the code and the existence of the conditions authorizing service in the mode adopted.[10]

§ 281. When Unnecessary.—Where the proposed bill and amendments are not presented to the judge, but are delivered to the clerk for the judge, under the alternative step provided in section 650 of the Code of Civil Procedure,[11] no notice of settlement is required from the party seeking the settlement of the bill.[12] The obvious purpose of the provision is that the parties may have notice of the time when the statement will be settled. When the papers are presented directly to the judge, there is no provision for any notice of the time of settlement to be thereafter given by either the judge or clerk; and in such case, therefore, the five days' notice must be given by the party himself. But when the papers are delivered to the clerk for the judge, the purpose of the code is effected through the requirement that then the judge must designate a time for the settlement, and the clerk must give notice of it. The provision about the five days' notice therefore qualifies only the preceding clause of the sentence, and is not applicable to the case when the papers are delivered to the clerk for the judge.[13]

9. See infra, § 281.

10. Gallardo v. Atlantic & Pacific Tel. Co., 49 Cal. 510, approved in Mohr v. Byrne, 131 Cal. 288, 63 Pac. 341 (provisions referred to in the text are prescribed in Code Civ. Proc., § 1015). See PROCESS.

11. See the provisions of this code section with reference to contested settlements, supra, § 280.

12. Horton v. Jack, 115 Cal. 29, 46 Pac. 920. See, also, Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480, and Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685, reaching the same conclusion with respect to the corresponding provision of subdivision 3, Code Civ. Proc., § 659, as it existed prior to 1915, relating to statements of the case for new trial, and pointing out the distinction between presentation to the judge and delivery to the clerk.

13. Mellor v. Crouch, 76 Cal. 594,

Again, when there is no controversy with regard to amendments, no notice of the settlement of the bill need be served on the adverse party,[14] for section 650 of the Code of Civil Procedure contains the following provision:

"If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee for settlement, without notice to the adverse party."

Furthermore, notice is not required if the bill is presented at the time the ruling excepted to is made, pursuant to section 649 of the Code of Civil Procedure.[15] After adjournment of court, however, a bill cannot be settled on ex parte application without notice to the adverse party.[16]

§ 282. **Waiver of Notice.**—The written notice provided for in section 650 of the Code of Civil Procedure is for the benefit of the adverse party, and may be waived by him.[17] Thus, if he appears and without objection participates in the settlement of the bill, he cannot be permitted afterward to say that it was not properly settled, because written notice was not given. Similarly, if he consents to a time designated by the court or judge for the settlement, he cannot be permitted, when that time arrives, to say that the bill should not be settled, because a written notice has not been served.[18] So, also, if he appears and consents without objecting to several continu-

18 Pac. 685. The opinion in this case, while rendered with particular reference to the old statutory provision as to the settlement of statements on motion for new trial, seems also applicable to the corresponding statutory provision as to the settlement of bills of exception, and was so considered in Horton v. Jack, 115 Cal. 29.

14. Broaddus v. James, 13 Cal. App. 478, 110 Pac. 164. The same was true of statements on appeal. Kavanagh v. Maus, 28 Cal. 261.

15. Estate of Scott, 128 Cal. 578, 61 Pac. 98; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

16. Estate of Scott, 128 Cal. 578, 61 Pac. 98.

17. O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130.

18. Hicks v. Masten, 101 Cal. 651, 36 Pac. 130.

ances of the hearing, he waives any right he may have had to challenge the sufficiency of the notice through which he appeared.[19] If the failure of the judge to fix a time for the settlement and give previous notice thereof can ever invalidate the settlement of a bill when the attorneys for both parties are actually present, it certainly cannot have that effect, unless, at the time, objection be made on that ground.[20] On the other hand, it should be noted that the fact that certain adverse parties have appeared at a hearing to settle a bill does not excuse the failure to serve notice on other adverse parties, even if the latter do not complain.[1]

Time for Presentation and Settlement.

§ 283. Time for Presentation Generally.—A party who has excepted to a decision of a court, whether he excepts in person at the time the decision was made or is deemed in law to have excepted, must, in statutory or reasonable time after his exception, avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge.[2] If the bill is not presented in time, the judge is not required to settle it,[3] and the bill must be disre-

19. O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225.

20. Horton v. Jack, 115 Cal. 29, 46 Pac. 920.

1. Ford & Sanborn Co. v. Braslan, Seed Growers Co., 10 Cal. App. 762, 103 Pac. 946.

2. Nash v. Harris, 57 Cal. 242.

3. Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Gamache v. Budd, 129 Cal. 554, 62 Pac. 105; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; In re Clary, 112 Cal. 292, 44 Pac. 569; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Visher v. Smith, 92 Cal. 60, 28 Pac. 94; Smith v. Solomon, 84 Cal. 537, 24 Pac. 286; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780; Howell v. Pedersen, 41 Cal. App. 45, 181 Pac. 674; McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521.

Idaho rule: The case of Coast Lumber Co. v. Wood, 18 Idaho, 28, 108 Pac. 338, distinguishes former Idaho Statute, Rev. Codes, § 4441, subd. 3, and former Cal. Code Civ. Proc., § 659, the rules thereunder being different, and hence, also, distinguishes the cases of Wills v. Kong, 70 Cal. 548, 11 Pac. 781, and Hicks

garded.[4] Indeed, unless the delay has been the result of arrangement by the attorneys for their accommodation,[5] or has been waived by the parties,[6] or relieved by the court,[7] or unless there is some showing why the bill was not prepared in time,[8] the judge is without jurisdiction to settle the bill, and if he does so, it cannot be considered upon appeal.[9]

Nevertheless, when a trial court is in doubt as to the right of a party to have a bill of exceptions settled, because the same has not been presented within time, the better practice is for the trial court to sign the bill of exceptions subject to objections thereto, the evidence in support of which should be incorporated in a bill of exceptions, so that the appellate court upon appeal will be in a position to determine whether or not such bill was presented for signature within time.[10] This rule is no doubt based upon the theory that it is the policy of the law to protect the right of appeal, which might in certain cases be materially affected or destroyed by a refusal of the court to sign the bill, and that if, upon the appeal, it is made to appear that the bill was not presented within the time required, it is within the province of the court

v. Masten, 101 Cal. 651, 36 Pac. 130. In the case Coast Lumber Co. v. Wood, supra, it was held that the failure of a moving party to deliver amendments with the proposed statement to the clerk within the time prescribed by the law is in effect an adoption of such amendments in which case the statement may be settled within a reasonable time thereafter and the trial court does not lose jurisdiction to make such settlement.

4. Kelleher v. Creciat, 89 Cal. 38, 26 Pac. 619.

5. Claffey v. Head, 2 Cal. Unrep. 156.

6. Slye v. Hunt, 29 Cal. App. 117, 54 Pac. 607. See infra, § 292.

7. See infra, §§ 293–295.

8. Gamache v. Budd, 129 Cal. 554, 62 Pac. 105.

9. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955; Higgins v. Mahoney, 50 Cal. 444; Rossi v. Scott, Magner & Miller, 41 Cal. App. 646, 183 Pac. 263; McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521. See, also, Shipman v. Unangst, 150 Cal. 425, 88 Pac. 1090, holding that a bill of exceptions presented to be used in a motion for a new trial cannot be used on appeal if presented too late.

10. Gay v. Torrance, 143 Cal. 14, 76 Pac. 717; Calkins v. Monroe, 17 Cal. App. 324, 119 Pac. 680.

to dismiss the appeal, or to refuse to entertain questions involved therein.[11]

Showing on appeal.—A mere objection to the settlement of a bill, in the absence of a showing that it was not presented in time does not authorize the appellate court to disregard the bill, for that court must presume that it was regularly settled.[12] Consequently, it is the duty of a respondent who urges that the bill was not presented in time to have matter incorporated therein in making such a showing affirmatively,[13] unless it appears on the face of the record that the date of presentation was too late.[14] Where this fact appears, it will not be presumed that there were sufficient reasons presented to the lower court to excuse the delay;[15] and if such facts exist, the appellant should therefore incorporate them in his bill.[16] Where there is a dispute as to the party upon whom it is claimed that the bill was not served in time, the determination of this question of fact is primarily for the trial tribunal, subject to review by the appellate court to the same extent only as its determination of other questions of fact.[17]

§ 284. **Statutory Periods.**—Where no order extending the time for the presentation of a bill of exceptions is applied for or granted,[18] the time for presentation is the time prescribed by law. There is no specific time fixed

11. Calkins v. Monroe, 17 Cal. App. 324, 119 Pac. 680.

12. Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

13. Hughes Mfg. & L. Co. v. Elliott, 167 Cal. 494, 140 Pac. 17.

14. Henry v. Maguire, 106 Cal. 142, 39 Pac. 599.

15. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955. See, however, Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751, where it said that the court will presume the time was extended by stipulation or order.

16. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955; Higgins v. Mahoney, 50 Cal. 444; Rossi v. Scott, Magner & Miller, 41 Cal. App. 646, 183 Pac. 263 (citing illustrative cases applying the rule to statements).

17. Dunham v. Bayley, 151 Cal. 216, 90 Pac. 543.

18. See infra, §§ 293–295.

by law for presenting a bill of exceptions for settlement, unless it be found in sections 649 and 650 of the Code of Civil Procedure.[19] Under section 649, an appellant should present his bill of exception at the time of the ruling excepted to, and under section 650, after the judgment.[20] Each of these statutory provisions is independent of the other, and the appellant may take advantage of either one. Thus, where he asks for a settlement within the time prescribed after the decision excepted to, it is immaterial that he has acted before the judgment or order appealed from was rendered.[1] Similarly, where he asks for a settlement within the time prescribed after judgment, it is immaterial that the time for requesting a settlement under the other procedure has passed.[2] Section 649 of the Code of Civil Procedure, allowing settlement after a decision, is in terms permissive, and the privilege granted the party of presenting his bill of exceptions for settlement at the time of the ruling is not necessarily exclusive.[3]

The code does not prescribe the time within which a bill of exceptions to an order of family allowance must be presented and approved. Such a bill must be presented within a reasonable time after constructive notice

19. Tregambo v. Comanche M. Co., 57 Cal. 501.

20. Turner v. Hearst, 115 Cal. 394, 47 Pac. 129. See infra, §§ 285, 286, where these code provisions are quoted.

1. Estate of Gordon, 142 Cal. 125, 75 Pac. 672.

2. Tregambo v. Comanche M. Co., 57 Cal. 501 (citing Caldwell v. Parks, 47 Cal. 640, Higgins v. Mahoney, 50 Cal. 444, and Berry v. San Francisco N. P. C. R. Co., 50 Cal. 435, as authority for this rule before the amendments of 1874 and 1876, and saying that those amendments were intended to regulate the right, not to destroy or limit it). In Pfister v. Wade, 59 Cal. 273, the court refused to reconsider the question decided in Tregambo v. Comanche Co., and in Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863, the court said, per Beatty, C. J.: "The decision in Tregambo v. Comanche M. Co. was a liberal ruling in favor of justice and ought to be followed in all cases where it can be applied without violating the express terms of the statute."

3. Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863.

of the order. What is a reasonable time is to be determined by the judge upon all the facts and circumstances.[4]

§ 285. After Decision.—Section 649 of the Code of Civil Procedure contains the following provision:

"A bill containing the exception to any decision may be presented to the court or judge, for settlement at any time after the decision is made, but the same must be presented within ten days after written notice of making such decision, and after having been settled must be signed by the judge and filed with the clerk."

This section permits the bill of exceptions to be settled at the time the decision is made, although the order appealed from has not been entered.[5] It applies to an exception to an appealable order rendered before final judgment as well as to a nonappealable order rendered before judgment.[6] Where the party proceeds under this section, and the certificate of the judge recites that the bill was "duly presented within the time allowed by law," it must be assumed that the bill was presented when the decision was made.[7] It will be observed that the ten-day period does not commence to run until written notice of the decision excepted to. Under this provision a party is justified in waiting until he has explicit notice before presenting his bill of exceptions. Incidental knowledge and indefinite information is insufficient.[8]

Prior to the amendment of 1907, which provided that the bill "may be presented . . . within ten days after the decision is made,"[9] and the amendment of 1911, which provided that the bill "must be presented within ten days

4. Leach v. Pierce, 93 Cal. 614, 29 Pac. 235.

5. Estate of Gordon, 142 Cal. 125, 75 Pac. 672.

6. Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863.

7. Estate of Gordon, 142 Cal. 125, 75 Pac. 672.

8. East Side Canal & Irr. Co. v. Superior Court, 30 Cal. App. 528, 158 Pac. 773.

9. Stats. 1907, p. 713.

after written notice of making such decision,"[10] this section did not fix any specific time for presenting a bill for settlement, but only declared that the act might be done immediately upon the rendering of the decision to which the exception is taken.[11] It contemplated the settlement at the time the decision was made during the trial and in the presence of counsel for both parties. It did not contemplate a settlement of the bill after the adjournment of court, and without any notice to adverse counsel.[12] Since it would frequently be extremely inconvenient to make up a bill of exceptions instanter,[13] it was the rule that a bill of exceptions ought to be settled and allowed if presented within a reasonable time after the order excepted to,[14] and the analogy furnished by sections 650 and 651 determined what was a reasonable time.[15]

§ 286. **After Judgment.**—Under the Practice Act, it was required that bills of exception be taken and settled at the trial,[16] or, in other words, that the exception be reduced to writing and settled by the judge immediately upon its taking.[17] There was no provision for a bill of exceptions to be settled after judgment.[18] There is no doubt, however, that section 650 of the Code of Civil Procedure provides for the settlement of bills of exception based on errors of law occurring at the trial of the cause, and that this may be done after the entry of judgment, and after the judgment-roll has been made up by the clerk.[19]

10. Stats. 1911, p. 402.

11. Tregambo v. Comanche M. Co., 57 Cal. 501.

12. Estate of Scott, 128 Cal. 578, 61 Pac. 98.

13. Flagg v. Puterbaugh, 98 Cal. 134, 36 Pac. 95.

14. Smith v. Jordan, 122 Cal. 68, 54 Pac. 368.

15. Smith v. Jordan, 122 Cal. 68, 54 Pac. 368; Flagg v. Puterbaugh, 98 Cal. 134, 36 Pac. 95.

16. Wetherbee v. Carroll, 33 Cal. 549.

17. Central Pacific R. Co. v. Pearson, 35 Cal. 247.

18. Wetherbee v. Carroll, 33 Cal. 549.

19. Caldwell v. Parks, 47 Cal. 643.

This section, in so far as it relates to the time for the presentation of a bill of exceptions, reads as follows:

"When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, at any time thereafter, and within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment, if the action was tried without a jury, or if proceedings on motion for a new trial be pending, within ten days after notice of decision denying said motion, or other determination thereof, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. . . . Within ten days after such service the adverse party may propose amendments thereto, and serve the same or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge."

Unless the draft is served and the proposed bill is presented within the time provided by the section, the appellant has no right to have it settled.[20]

§ 287. Application of Code Provision.—Section 650 of the Code of Civil Procedure fixes the time for the presentation of all bills of exception, including exceptions taken in the course of proceedings before the trial has commenced, and exceptions taken after judgment.[1] Indeed, section 651 of the same code reads:

20. Moultree v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Smith v. Solomon, 84 Cal. 537, 24 Pac. 286; Hiestand v. West, 31 Cal. App. Dec. 196, 187 Pac. 967; Roth v. Vaughan, 33 Cal. App. Dec. 260, 187 Pac. 44; Rossi v. Scott, Magner & Miller, 41 Cal. App. 646, 183 Pac. 263; McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521.

1. Tregambo v. Comanche M. Co., 57 Cal. 501. See, however, County of Sacramento v. Central Pacific R. Co., 61 Cal. 250, where it is said that this section relates to excep-

"Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in section six hundred and forty-nine, or a bill thereof may be presented and settled afterward, as provided in section six hundred and fifty, and within like periods after entry of the order, upon appeal from which such decision is reviewable."

Under the provisions of section 650, a party is entitled to ten days after the day on which judgment is entered to prepare and serve his draft of a bill of exceptions.[2] As there can be only one judgment in an action, it follows that if for any reason a judgment that has been entered is vacated, and another judgment entered in lieu thereof, this last judgment becomes the only one in the case, and the notice of its entry is the point of time from which the right to have a bill of exceptions settled begins to run. For this purpose there is no distinction between a judgment rendered by a trial court upon its original determination of the cause and a judgment which it enters in obedience to the direction of the appellate tribunal.[3] It will be observed that where no amendments are proposed, or, if proposed, are acceded to, there is no time stated within which the bill must be presented for settlement.[4] If the party seeking the bill objects to the proposed amendments until after the time for presentation has expired, his subsequent acceptance of them is unavailing to procure a settlement of the bill after the court had declined to settle it.[5]

tions taken at a trial, and not to exceptions taken after trial and judgment.

2. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955; McCarty v. Wilson, 2 Cal. App. 154, 83 Pac. 170. Until 1874, this section provided that the bill might be presented on one day's notice at any time within thirty days after the entry of judgment; Higgins v. Mahoney, 50 Cal. 444; Caldwell v. Parks, 47 Cal. 640.

3. Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876.

4. Gay v. Torrance, 143 Cal. 14, 76 Pac. 717; Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972.

5. Hiestand v. West, 31 Cal. App. Dec. 196, 187 Pac. 967, distinguishing Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63, and Gay v. Tor-

The ten days' time "after notice of decision" denying a motion for new trial or "other termination" of such a motion, within which a party may serve a proposed bill of exceptions commences to run immediately upon the failure of the trial court to pass on the motion within three months after the verdict of the jury or service on the moving party of notice of decision of the court.[6]

§ 288. Time for Settlement.—The time within which the judge may settle a bill after it has been presented to him is not fixed by statute.[7] It is only required of counsel that the proposed bill be presented within the time allowed by law, and if the court actually settles it at a date later than its presentation, this cannot affect the right of the appellant.[8] Indeed, the practice of proposing a bill in skeleton form is possible simply because no absolute limit is placed upon the time within which the judge can certify to the bill.[9] In any case, it is clear that an objection that a bill was not settled until sixteen days after amendments thereto had been proposed cannot be considered on appeal when no objection was taken in the court below,[10] and that a party cannot be charged with laches in the matter of the settlement of his proposed bill when he does all in his power to secure a settlement, and the delay is due to the objections of the adverse party and the rulings of the judges in sustaining the same.[11] Indeed, it is no objection to a bill of exceptions that it was not settled until after appeal was taken, for its settlement may have been postponed by or-

rance, 143 Cal. 14, 76 Pac. 717, 793—cases where, on a delayed presentation, there appeared to be no opposition to the amendments).

6. Bernschein v. Whitaker, 175 Cal. 130, 165 Pac. 523 (motion not determined in three months is deemed denied under provisions of Code Civ. Proc., § 660).

7. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

8. Estate of Gordon, 142 Cal. 125, 75 Pac. 672.

9. Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972.

10. Horton v. Jack, 115 Cal. 29, 46 Pac. 920.

11. Leach v. Pierce, 93 Cal. 614, 29 Pac. 235.

der of the trial judge for sufficient reasons, and it must be presumed, nothing appearing to the contrary, that this was the case.[12] In this connection it may be noted that the trial court has jurisdiction of the settlement of a bill of exceptions although an appeal has been taken from the judgment.[13]

Extension of Time.

§ 289. In General.—Section 1054 of the Code of Civil Procedure contains the following provision relating to the extension of time for presenting bills of exceptions:

"Where an act to be done, as provided in this code, relates to . . . the preparation of bills of exceptions, or of amendments thereto, . . . the time allowed by this code, unless otherwise expressly provided, may be extended, upon good cause being shown; . . . but such extension shall not exceed thirty days, without the consent of the adverse party."[14]

Pursuant to this statutory provision, the time for presenting a bill of exceptions may be extended within the limits of thirty days,[15] in addition to the ten days ordinarily allowed.[16] The order of extension must be granted, however, before the end of the ten-day period allowed by law,[17] and the period of extension must not exceed thirty days.[18] An order granting an extension of twenty days' time in which to file a bill is an adjudication that the period as extended is a reasonable time.[19]

12. Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

13. Colbert v. Rankin, 72 Cal. 197, 13 Pac. 491.

14. This section provides also that if the attorney of record is actually attending a session of the state legislature, the judge shall extend the time until thirty days after the adjournment thereof.

15. Tregambo v. Comanche Min. Co., 57 Cal. 501; Pink v. Catanich, 51 Cal. 420.

16. Cameron v. Arcata etc. R. R. Co., 129 Cal. 279, 61 Pac. 955 (under Code Civ. Proc., § 650); Moffat v. Cook, 65 Cal. 236, 3 Pac. 805 (under Code Civ. Proc., § 659).

17. See infra, § 290.

18. See infra, § 291.

19. Leach v. Pierce, 93 Cal. 627, 29 Pac. 239.

In harmony with the general rule that failure to present a bill within the required time must be explained by the appellant, if it appears on the face of the record,[20] it has been said by the supreme court that if the respondents, objecting to the settlement of the bill of exceptions, rely upon the lapse of the period limited by the statute, it becomes the duty of the appellant to incorporate into the bill the matter going to excuse his apparent delay, such as an extension of time, and that otherwise the exceptions, though settled, cannot be considered on appeal.[1] But where there is nothing in the transcript to show that any objection was made, the appellate court will presume, in the absence of a showing to the contrary, in favor of the regularity of the action of the lower court, that a bill of exceptions was properly settled, and therefore that the time was extended by stipulation or order of the court.[2]

§ 290. Time for Order of Extension.—To be effective, an order extending the time for the presentation of a bill of exceptions must be made before the expiration of the period otherwise allowed.[3] The order of a judge granting an extension of time after the expiration of the statutory period within which to propose a bill is ineffectual and void, and is properly ignored by the court.[4] In this connection it has been held that an order extending the time in which a party may present a bill of exceptions for an appeal does not extend the time in which he may present a bill for a motion for new trial, and therefore that an

20. See supra, § 283.

1. Higgins v. Mahoney, 50 Cal. 444.

2. Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751.

3. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955; Estate of Clary, 112 Cal. 292, 44 Pac. 569; Rath v. Vaughan, 30 Cal. App. Dec. 911, 187 Pac. 44; Howell v. Pedersen, 41 Cal. App. 45, 181 Pac. 674. The same rule applies to the extension of the period of a motion for new trial (Clark v. Crane, 57 Cal. 629), and of a statement on motion for new trial (Freese v. Freese, 134 Cal. 48, 66 Pac. 43).

4. Estate of Clary, 112 Cal. 292, 44 Pac. 569.

order extending the period for presenting the latter bill is too late if made more than ten days after notice of intention to move for a new trial, although made before the expiration of the extended period for the bill for appeal.[5]

Nevertheless, when the time for service expires on Sunday, the court may extend the time by an order made on the following Monday. A bill served on Monday would have been in time, in view of section 12 of the Code of Civil Procedure, and the court had power on that day to extend the time.[6] Furthermore, where the adverse party, after several unauthorized extensions by the court, stipulates for a further extension, or accepts the draft within the extended period, he is estopped from objecting to the allowance and settlement of the bill on the ground that it was presented too late.[7]

An order extending the time for service of a proposed bill of exceptions may be made in advance of the judgment.[8]

§ 291. Period of Extension Allowed.—Section 1054 of the Code of Civil Procedure does not allow the court to extend the period for presenting a bill of exceptions for more than thirty days beyond the time allowed by law without the consent of the other party.[9] It cannot be construed as declaring that the court cannot grant an extension of more than thirty days at any one time, but that it may make several extensions of thirty days each, and thus extend the time for more than thirty days.[10] Such construction would be in direct violation of the lan-

5. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955.

6. Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139.

7. Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523.

8. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976.

9. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955; Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523; Rossi v. Scott, Magner & Miller, 41 Cal. App. 646, 183 Pac. 263. The same is true of statements. Bryan v. Maume, 28 Cal. 238.

10. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955.

guage of the section, and contrary to previous decisions of the court.[11] The provision in section 650 of the Code of Civil Procedure that the draft of the bill may be prepared and served within ten days after the entry of judgment, "or such further time as the court in which the action is pending, or a judge thereof, may allow," does not authorize the court to grant an indefinite extension of time for the preparation and serving of the draft, but is to be read in connection with the restriction in section 1054 upon the amount of time which may be allowed by the court.[12]

While the total period of extension must not exceed thirty days, there is no rule against successive orders, each made within the period already allowed, providing for a series of extensions aggregating not more than thirty days. Thus it is permissible to have three orders, each extending the time allowed for ten days.[13]

Waiver of Default and Relief Therefrom.

§ 292. Waiver by Party.—The rule is well established that delay in the presentation of a bill of exceptions may be waived by the adverse party.[14] As the reason for this rule, it has been said that jurisdiction of the subject matter does not depend on prompt service of a bill of exceptions, as it does in the case of a notice of intention to move for a new trial.[15] In fact, where the adverse

11. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955, citing Bunnell v. Stockton, 83 Cal. 319, 23 Pac. 301, and Bryan v. Maume, 28 Cal. 238.

12. Cameron v. Arcata etc. R. Co., 129 Cal. 279, 61 Pac. 955.

13. Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139.

14. Title Ins. & Trust Co. v. California Dev. Co., 171 Cal. 173, 152 Pac. 542; Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770; Slye v. Hunt, 29 Cal. App. 117, 154 Pac. 607; Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523 (holding that a party stipulating for an extension of time is estopped to assert that a previous order of extension was unauthorized).

15. Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542, per Sloss, J.

party desires to avail himself of the objection that a bill of exceptions was not presented in time, he must interpose it in the trial court, or he cannot do so on appeal.[16]

Waiver of delay may be found in participation in proceedings for settlement without raising an objection as to the time of presentation,[17] or in a stipulation for an extension of time.[18] It has been shown, on an appeal from a judgment, though not on an appeal from an order denying a new trial, by means of a supplemental bill of exceptions.[19] No waiver can be found, however, in the acceptance of service or in a stipulation for a hearing if the party expressly reserves the right to object to the delay.[20]

§ 293. Relief by Court.—Section 473 of the Code of Civil Procedure provides as follows:

"The court may, . . . upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Under this section the rule is now well established that it is entirely within the power of the trial court, upon application in that behalf made within the proper time and upon a sufficient showing, to relieve a party from the effects of his mere failure to serve his proposed bill of exceptions within the prescribed time, where objection to the settlement is made on that ground, and thereupon to settle the bill.[1] In appropriate cases, the lower court

16. Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543; Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 Pac. 62; Estate of Dougherty, 139 Cal. 14, 72 Pac. 357; Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; Mendocino County v. Peters, 2 Cal. App. 24, 82 Pac. 1122 (citing earlier California cases).

17. Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770; Slye v. Hunt, 29 Cal. App. 117, 154 Pac. 607.

18. Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523.

19. Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542.

20. Howell v. Pedersen, 41 Cal. App. 45, 181 Pac. 674.

1. Haviland v. Southern California Edison Co., 172 Cal. 601, 158 Pac. 328; Title Ins. & Trust Co. v. California Development Co., 171 Cal.

may make its order of relief conditional.[2] If a motion for relief from default has not been made, but is merely contemplated, it cannot be said that there is a proceeding pending for such relief.[3]

The question as to whether the facts are such as to warrant relief, under section 473 of the Code of Civil Procedure, from delay in serving or presenting a bill of exceptions, is primarily one for the trial court, and that court is vested with a large discretion in such matters,[4] although its decision in this regard is appealable.[5] Consequently, an order granting such relief will not be disturbed on appeal unless it clearly appears that the court or judge was guilty of gross abuse of discretion in making it.[6] While the correctness of the ruling may be

173, 152 Pac. 542; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Oppenheimer v. Radke & Co., 165 Cal. 220, 131 Pac. 365; Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543 (where Angellotti, J., states the rule as given in the text); Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332 (the leading case); Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523; Mattern v. Alderson, 18 Cal. App. 590, 123 Pac. 972; People v. Everett, 8 Cal. App. 430, 97 Pac. 175 (a criminal case); Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

2. McCarty v. Wilson, 2 Cal. App. 154, 83 Pac. 170 (citing other cases upholding conditional orders under Code Civ. Proc., § 473).

3. Rath v. Vaughan, 30 Cal. App. Dec. 911, 187 Pac. 44.

4. Oppenheimer v. Radke & Co., 165 Cal. 220, 131 Pac. 365; Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543. See, also, Jaffe v. Lilienthal, 101 Cal. 175, 35 Pac. 636, saying that the question as to whether delay in filing a settled bill of exceptions is unreasonable is for the lower court to determine, and in the absence of a bill of exceptions setting out the facts an order allowing a filing nunc pro tunc cannot be reviewed.

5. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280 (holding, however, that there can be no appeal from a mere refusal to settle). The same is true of statements: Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176.

6. Haviland v. Southern California Edison Co., 172 Cal. 601, 158 Pac. 328; Hole v. Takekawa, 165 Cal. 372, 132 Pac. 445; Oppenheimer v. Radke & Co., 165 Cal. 220, 131 Pac. 365; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Howell v. Pedersen, 41 Cal. App. 45, 181 Pac. 674; Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523; Smith v. Riverside Groves etc. Co., 19 Cal. App. 165, 124 Pac. 870; Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

doubted, nevertheless an appellate court will not substitute its own opinion and thereby divest the trial court of that discretionary power reposed in it.[7] This is true whether the application be granted or denied.[8] Indeed, in cases of doubt, the court ought to resolve the doubt in favor of the application, so that the full merits of the litigation may be presented.[9] Furthermore, since a large discretion is vested in the trial court, the appellate court will not command it to grant relief by use of a writ of mandate.[10]

§ 294. Circumstances Justifying Relief.—Several illustrations may be given of circumstances justifying the lower court in relieving a party from the effect of his failure to serve or present a bill of exceptions in time. Thus, the court may relieve a party from his failure to serve the draft of a bill of exceptions in time where the delay was due to the excusable inadvertence of the attorney in misreading a stipulation providing for an extension of the time,[11] or in entering the last day for serving notice of intention to move for a new trial,[12] or to his error in thinking that his managing clerk had in due time obtained an order of extension.[13] So, also, the court may relieve a party from an omission to file a bill of exceptions and amendments in time where it is shown that they were mailed to the clerk in due time and that they did not reach him because they were lost in transmission through the mail;[14] or when it is shown that they were

7. Smith v. Riverside Groves etc. Co., 19 Cal. App. 165, 124 Pac. 870.

8. Hole v. Takekawa, 165 Cal. 372, 132 Pac. 445.

9. Hole v. Takekawa, 165 Cal. 372, 132 Pac. 445; Banta v. Siller, 121 Cal. 414, 53 Pac. 935 (citing a number of California cases); Kramm v. Stockton Electric R. Co., 22 Cal. App. 737, 136 Pac. 523.

10. Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50.

11. Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332.

12. Haviland v. Southern California Edison Co., 172 Cal. 601, 158 Pac. 328.

13. Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425.

14. Long v. Long, 162 Cal. 427, 122 Pac. 1077.

presented one day late, due to the excusable inadvertence of the attorney.[15]

On the other hand, relief is not justified where the appellant was ignorant of the limitation of time allowed, and did not advise with his attorneys on the subject, but allowed the time to pass while engaged in unsuccessful negotiations to effect a compromise.[16] Where the grounds for asking relief amount to little more than excusable forgetfulness or failure to observe the flight of time, arising out of occupation in other cases, the facts are such as to justify the court either in granting or refusing the motion without such abuse of discretion in either case as would warrant reversal.[17]

§ 295. Time of Application for Relief.—Since proceedings for the settlement of a bill of exceptions are "proceedings in an action,"[18] an application to amend or correct a settled bill must be made within the period of limitation prescribed for proceedings by section 473 of the Code of Civil Procedure.[19] This section in terms limits the cases in which relief may be granted to those wherein the application for relief is made within a reasonable time, and in no case "exceeding six months after such judgment, order, or proceeding was taken." Nevertheless, application may be made more than six months after the default and the service of the bill, for the relief is not from the failure to serve the bill on time, but rather from some proceeding of the adverse party, or some order of the court, based thereon. While it has been said that there is no reason why one who finds himself in default may not anticipate the objection or proceeding to be taken against him based thereon, and make his application for relief at once, it has been held that the applica-

15. Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272.

16. Oppenheimer v. Radke & Co., 165 Cal. 220, 131 Pac. 365.

17. McCarty v. Wilson, 2 Cal. App. 154, 83 Pac. 170.

18. See supra, § 273.

19. Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682.

tion is not too late if made at the time the objection based on the default is presented to the court, or within a reasonable time thereafter.[20] It has been held that the relief sought under section 473 may be granted after the expiration of the statutory period if the proceedings for relief were commenced within that time.[1] The order so given is certainly not void, and is conclusive where no appeal was taken therefrom.[2]

Mandamus to Compel Settlement.

§ 296. Right to Mandamus.—The rule is well established in California that if the trial judge refuses without cause to settle a bill of exceptions, he may be compelled to take action by a writ of mandamus.[3] As the reason for the availability of mandamus, it has been said that the settlement of a bill of exceptions is an act which the

20. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911, per Angellotti, J.

1. Baker v. Borello, 131 Cal. 615, 63 Pac. 914; Doyle v. Bradshaw, 41 Cal. App. 247, 183 Pac. 185.

2. Doyle v. Bradshaw, 41 Cal. App. 247, 183 Pac. 185 (on rehearing in the supreme court).

3. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Crooks v. Superior Court, 136 Cal. 23, 68 Pac. 96; Boyer v. Burnett, 134 Cal. 481, 60 Pac. 657; Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935; Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95; Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863; Tibbets v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; Leach v. Pierce, 93 Cal. 624, 29 Pac. 238; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235; James v. McCann, 93 Cal. 513, 29 Pac. 49; Visher v. Smith, 92 Cal. 60, 28 Pac. 94; Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; East Side Canal & Irr. Co. v. Superior Court, 30 Cal. App. 528, 158 Pac. 773; Slye v. Hunt, 29 Cal. App. 117, 154 Pac. 607; Cripe v. Unangst, 20 Cal. App. 75, 128 Pac. 345; Calkins v. Monroe, 17 Cal. App. 324, 119 Pac. 680; Miller v. American Central Ins. Co., 2 Cal. App. 271, 83 Pac. 289. The same rule applies in criminal cases, according to People v. Bitancourt, 74 Cal. 188, 15 Pac. 744, citing People v. Crane, 60 Cal. 279; People v. Hewill, 56 Cal. 117; People v. Keyser, 53 Cal. 183; and People v. Lee, 14 Cal. 510.

law requires the judge to perform, a duty resulting from his office.[4] In the early days it was said that the remedy by appeal, if it exist, is inadequate;[5] and in the later days it has been said that mandamus is the exclusive remedy,[6] since a wrongful refusal to settle a bill is not the subject of an appeal,[7] nor of a proceeding under section 652 of the Code of Civil Procedure to require settlement by the supreme court.[8] The petition for writ of mandamus should allege in substance that the proposed bill contained everything that the petitioner honestly believed it should contain in order to make it a fair and proper draft of a bill.[9]

Limitation on right.—A writ of mandamus will not issue to compel the settlement of the bill of exceptions in any particular way,[10] for the judge cannot be compelled to settle any particular bill or to insert or exclude any particular facts.[11] A judge may be compelled to act by mandate, but his discretion cannot be controlled thereby.[12] Thus, where the judge, complying with a writ of mandate, has settled a bill of exceptions, the writ is

4. Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, citing Landers v. Landers, 82 Cal. 480, 23 Pac. 126.

5. Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, citing Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615, and Estate of Herteman, 73 Cal. 545, 15 Pac. 121, cases involving mandamus for the settlement of statements.

6. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280.

7. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280 (saying, however, that a refusal to grant relief under Code Civ. Proc., § 473, is appealable); Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; Miller v. American Central Ins. Co., 2 Cal. App. 271, 83 Pac. 289. The same rule applies to statements: Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176.

8. See infra, § 305.

9. Walkerly v. Greene, 104 Cal. 208, 37 Pac. 890.

10. People v. Bitancourt, 74 Cal. 188, 15 Pac. 744, citing People v. Judge of Tenth Judicial District, 9 Cal. 19.

11. Leach v. Pierce, 93 Cal. 614, 29 Pac. 235. See Holland v. Superior Court, 169 Cal. 361, 146 Pac. 878 (holding that mandamus will not lie to compel the striking out of matter from a settled bill of exceptions).

12. Thornton v. Hoge, 84 Cal. 232, 23 Pac. 1112 (per Patterson, J., concurring).

functus officio, having accomplished the purpose for which it was issued; and the party seeking the bill cannot obtain an order of reference from the appellate court in order that evidence may be taken on the issue of the correctness of the bill settled.[13]

§ 297. Circumstances Excluding Right.—Although a petition for a writ of mandamus is the proper remedy following a wrongful refusal to settle a bill of exceptions,[14] mandamus is not available in all circumstances. Thus, it has been held that if a judge refuses to settle a bill, and an application for mandamus against him is dismissed for want of prosecution, a writ of mandamus will not be issued to compel settlement by his successor in office.[15] Neither will it be issued to compel a settlement by a former judge.[16] Again, mandamus will not lie to compel the settlement of a bill where the evidence is conflicting as to whether or not it was presented in time;[17] or where the facts are such as to preclude a settlement.[18] Furthermore, where a petition asks for a mandamus requiring the settlement of a bill of exceptions containing certain affidavits, the alternative writ will be discharged, and the peremptory writ denied, if it is shown that one of the affidavits covered should not be included in the bill.[19] A writ of mandamus will not be issued by the dis-

13. Thornton v. Hoge, 84 Cal. 232, 23 Pac. 1112. Patterson, J., concurring, said: "The remedy after a bill is settled is provided by section 652 of the Code of Civil Procedure."

14. See supra, § 296.

15. Visher v. Smith, 92 Cal. 60, 28 Pac. 94. Compare with Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, where mandamus was issued against the successor of a judge who has declined to settle a bill of exceptions.

16. See infra, § 298.

17. Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850. See, however, Visher v. Smith, 92 Cal. 60, 28 Pac. 94, where it is said that if the judge makes an erroneous ruling as to whether there were circumstances affording a legal excuse for failure to present a bill in time, this can be corrected under a mandamus from the appellate court.

18. See infra, § 299.

19. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

trict court of appeal to compel the settlement of a bill to be used on an appeal which lies to the supreme court.[20]

Absence of substantial need.—It is a rule of law that the writ of mandate will not issue where it would be of no benefit to the applicant, and that a mere abstract right, unattended by any substantial benefit, will not be enforced by mandamus.[1] It would be a vain thing, of course, to settle a bill of exceptions if there is no appeal, and a petition for mandamus, if presented after the time for appeal has expired, will therefore be denied unless it shows that an appeal has been taken.[2] Similarly, the petition will be denied if it appears, from the filing of the transcript on appeal, that the bill of exceptions has been settled by the trial judge.[3]

Relief from delay and laches.—The trial court cannot be compelled by mandamus to relieve a party, under section 473 of the Code of Civil Procedure, from the consequences of his failure to serve or present his bill of exceptions within the time required by law, for whether or not such relief is to be granted is a matter resting in the discretion of the trial court.[4] Neither can the trial court be compelled to relieve the party seeking a bill from the effect of his laches in failing to be present at the time appointed for settlement and in delaying a subsequent attempt to secure the signature of the judge.[5]

§ 298. Settlement by Former Judge.—While the California court has recognized that the legislature may authorize a former judge to settle a bill of exceptions after

20. Stewart v. Torrance, 9 Cal. App. 209, 98 Pac. 396.

1. Gay v. Torrance, 145 Cal. 144, 78 Pac. 540. See MANDAMUS.

2. Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863.

3. In re Donnolly, 7 Cal. Unrep. 172, 74 Pac. 139.

4. Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50; approved in Hicks v. Masten, 101 Cal. 651, 36 Pac. 130. To the same effect, see, also, Brown v. Prewett, 94 Cal. 502, 29 Pac. 951, a criminal case.

5. Coffey v. Grand Council, 87 Cal. 367, 25 Pac. 547.

he has ceased to be a judge,[6] it has held that the legislature cannot compel the former judge to do so,[7] and that mandamus will not lie to compel such a settlement.[8] As the reason for this rule, it has been said that the legislature cannot enjoin upon a private citizen the duty of settling a bill of exceptions, nor require a person who has been a judge to continue to discharge judicial duties after his term of office has expired.[9]

The code provides that if the

"Judge or judicial officer [who made the decision excepted to], before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its orders or rules, direct."[10]

Since one who has ceased to be a judge cannot be compelled to settle a bill, and since the supreme court for some time did not adopt a rule directing the manner in which settlement should be had, it was held that the appellant should make special application to the supreme court for an order directing the settlement. This step should be taken promptly and within a reasonable time after the appellant is informed that the former judge refuses settlement.[11] It seems that the appellant might also present his bill to the succeeding judge, and that mandamus would lie to compel a settlement by him.[12] A rule of the supreme court now provides that the bill "may be settled and certified by the judge's successor in

6. See supra, § 278.

7. Estate of Depeaux, 118 Cal. 522, 50 Pac. 682; Leach v. Aitken, 91 Cal. 484, 28 Pac. 777.

8. Leach v. Pierce, 93 Cal. 624, 29 Pac. 238; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235; Leach v. Aitken, 91 Cal. 484, 28 Pac. 777 (the principal case).

9. Leach v. Aitken, 91 Cal. 484, 28 Pac. 777, per Sharpstein, J.

10. Code Civ. Proc., § 653.

11. Estate of Depeaux, 118 Cal. 522, 50 Pac. 682.

12. Leach v. Pierce, 93 Cal. 624, 29 Pac. 238; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235.

office, or if he is disqualified, by a judge of the same or an adjoining county.''[13]

§ 299. Facts Precluding Settlement.—Obviously, mandamus will not issue to compel the settlement of a bill of exceptions if the facts are such as to justify the trial judge in refusing the settlement.[14] In this connection, it may be observed that a bill of exceptions need not be settled if it is not signed by the attorney or the party offering it,[15] if there is an absence of evidence of the required notice to the adverse party,[16] or if the party presenting it has not paid the jury fees as required by statute.[17] Of course a bill of exceptions need not be settled if it is not presented within the time required,[18] or if the testimony is not properly reduced.[19] Again, it is good reason for refusing to settle a bill that the counsel for the party seeking it were not present at the time fixed for settlement and thereafter withdrew the draft and amendments from the control of the judge and held them for a considerable period without excuse for the delay.[20] Finally, the judge cannot be required to certify to a bill which

13. Rule XXVII of the Supreme Court: 177 Cal. xliii, 176 Pac. vii, quoted in full, supra, notes to § 278.

14. See, generally, the cases cited in this section.

15. Landers v. Lawler, 84 Cal. 547, 24 Pac. 307.

16. Gallardo v. Atlantic & Pacific Telegraph Co., 49 Cal. 510. As to the necessity for notice, see supra, §§ 280–282.

17. Lukes v. Hogan, 66 Cal. 33, 4 Pac. 883 (referring to Act of March 28, 1868, Stats. 1867–68, p. 436, providing that no further steps shall be allowed in an action until the plaintiff pays the jury fees where the jury in a civil case is discharged without finding a verdict).

18. Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850; Gamache v. Budd, 129 Cal. 554, 62 Pac. 105; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Estate of Clary, 112 Cal. 292, 44 Pac. 569; Visher v. Smith, 92 Cal. 60, 28 Pac. 94; Smith v. Solomon, 84 Cal. 537, 24 Pac. 286; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521; Fighiera v. Dewhirst, 32 Cal. App. 245, 162 Pac. 655. As to the time required, see supra, § 283 et seq.

19. See infra, § 301.

20. Coffey v. Grand Council, 87 Cal. 367, 25 Pac. 547 (papers withheld for a month).

he knows to be incorrect,[1] and a writ of mandate will be refused when the instrument submitted does not show an attempt to present such a fair and bona fide statement of the case as entitles it to be considered and settled as a bill of exceptions.[2]

§ 300. Facts not Precluding Settlement.—In general, it is the duty of the trial judge to facilitate, rather than to obstruct, a party in his efforts to have the errors in the decree, if there were any, corrected upon the appeal.[3] Accordingly, it has been held that a bill of exceptions, if presented within the time required, should be settled by the trial judge, notwithstanding the fact that it is entitled "plaintiff's proposed statement on appeal,"[4] that an account-book which should be a part of the bill has been mutilated,[5] that the bill contains no request for certification and settlement,[6] that the fees of the shorthand reporter have not been paid,[7] that all of the adverse parties have not been served therewith,[8] or that settlement was refused by the judge's predecessor in office.[9] Furthermore, the judge should not refuse to settle a bill because it is not an ideal bill when it is first presented,[10] even if it is inaccurate, untrue in many respects, meager and partial,[11] nor should he refuse settlement because he

1. Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972.

2. Pacific Land Assn. v. Hunt, 105 Cal. 202, 38 Pac. 635.

3. Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935.

4. People v. Crane, 60 Cal. 279.

5. Crooks v. Superior Court, 136 Cal. 23, 68 Pac. 96.

6. Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95 (where the court says that Landers v. Lawler, 84 Cal. 547, 24 Pac. 307, is not authority for a contrary rule).

7. James v. McCann, 93 Cal. 513, 29 Pac. 49.

8. Estate of Young, 149 Cal. 173, 85 Pac. 145; Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935.

9. Leach v. Pierce, 93 Cal. 624, 29 Pac. 238, and Leach v. Pierce, 93 Cal. 614, 29 Pac. 235 (holding that mandamus will issue against the incumbent judge, although not against the former judge).

10. Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890.

11. Sansome v. Myers (Sansom v. Superior Court), 80 Cal. 483, 22 Pac. 212.

believes that the bill will not be considered on appeal,[12] nor that the decision appealed from does not affect the right of the moving party.[13] A judge should not refuse his certificate because the bill has been filed without it. Such a filing is premature and unauthorized, and if a timely request is made for a certificate of allowance, it should be granted.[14] Neither should he refuse to settle the bill unless he is furnished with a transcription of the reporter's notes, even though he has forgotten many matters with the lapse of time. This difficulty can be obviated by having the reporter read to the judge the notes taken at the trial.[15]

§ 301. Reduction of Testimony.—Where the proposed bill is either merely a copy of the reporter's transcript, without any effort to reduce to proper form for the purpose of presenting the questions involved, or where it is a mere skeleton, so bald of the essential requisites of the bill contemplated by the statute that it cannot in any true sense be regarded as such, it may be disregarded, and a settlement of it will not be required.[16] This doctrine, however, is a harsh and rigid one, and if inconsiderately applied, would be liable to great abuse, and might operate as a virtual denial of justice to a party, solely through the ignorance, incompetency or indolence of counsel, for which he may be in no way responsible. For these reasons it should not be extended to cases not falling strictly within the class to which it has heretofore

12. Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935.

13. Calkins v. Monroe, 17 Cal. App. 324, 119 Pac. 680.

14. Jackson v. Puget Sound Lumber Co., 115 Cal. 632, 47 Pac. 603.

15. Cripe v. Unangst, 20 Cal. App. 75, 128 Pac. 345, following Vatcher v. Wilbur, 144 Cal. 536, 78 Pac. 14, a case involving a statement for new trial.

16. Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101; Sansome v. Myres, 77 Cal. 353, 19 Pac. 577; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Valleau v. Superior Court, 62 Cal. 290; People v. Sprague, 53 Cal. 422; Cripe v. Unangst, 20 Cal. App. 75, 128 Pac. 345. As to the proper reduction of testimony, see supra, § 271.

been held to apply. Even in such cases it would be better, as a general rule, if the judge of the trial court, disregarding as far as possible technical objections, should endeavor to settle the bill rather than refuse it. For this purpose it is not necessary that the labor of making a proper bill of exceptions should be assumed by the judge. The party presenting the objectionable bill could be required by the judge to put it in proper shape, giving a reasonable time for such purpose.[17] If the document presented is not in reality a bill of exceptions, that fact should be called to the attention of the attorney presenting it; the judge should inform him that for such reason the document will not be considered as a bill of exceptions, and that he must prepare a real bill within a reasonable time.[18]

Settlement by Supreme Court.

§ 302. In General.—Where the trial judge, in settling a bill of exceptions, refuses to allow one or more exceptions which, in accordance with the facts, ought to be allowed, the remedy is by petition to the supreme court, as provided in section 652 of the Code of Civil Procedure.[19]

This section reads as follows:

"If the judge in any case refuses to allow a bill of exceptions in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in

17. Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101, per Van Fleet, J. To the same effect see Winters v. Buck, 121 Cal. 279, 53 Pac. 799; Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890, and Sansome v. Myers (Sansom v. Superior Court), 80 Cal. 483, 22 Pac. 212.

18. Sansome v. Myers (Sansom v. Superior Court), 80 Cal. 483, 22 Pac. 212; McFarland, J., concurring); Winters v. Buck, 121 Cal. 279, 53 Pac. 799.

19. Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773 (citing Tibbets v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; In re Gates, 90 Cal. 257, 27 Pac. 195; Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092, and Landers v. Landers, 82 Cal. 480, 23 Pac. 126).

the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause."[20]

The supreme court has never made formal rules governing applications to prove exceptions,[1] but the construction of the foregoing section, both as to the extent of the power which it confers on the supreme court, and the proper practice in invoking that power, have been settled by judicial decisions. As to the extent of the powers of the supreme court, the construction has been rather strict, but so far as the mode of procedure is concerned the practice has been sufficiently liberal.[2]

§ 303. Function of District Courts of Appeal.—Section 652 of the Code of Civil Procedure, providing for the settlement of bills of exception which are refused by the trial judge, in terms extends the right of settlement only to the supreme court,[3] and in practice all of the cases for settlement under this section appear to have been taken to that tribunal.[4] It is to be observed, however, that the amendments to the state constitution which created the district courts of appeal include the following provision:

20. Prior to 1907, the first clause of the code section above quoted contained "an exception" instead of "a bill of exceptions." Section 189 of the Practice Act was the same on this subject as section 652 of the code (Landers v. Landers, 82 Cal. 480, 23 Pac. 126), and the provision in section 1174 of the Penal Code is like that in section 652 of the Code of Civil Procedure (People v. Bitancourt, 73 Cal. 1, 14 Pac. 372), except that it prescribes the method of proving the bill before the supreme court. People v. Knoblock, 11 Cal. App. 333, 104 Pac. 1012.

1. See infra, § 307.

2. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098 (per Beatty, C. J., citing the leading California cases construing this section, and stating the principal rules previously determined).

3. See supra, § 302, where this code section is quoted.

4. See, generally, the cases cited, §§ 302–309.

"All statutes now in force allowing, providing for, or regulating appeals to the supreme court shall apply to appeals to the district courts of appeal, so far as such statutes are not inconsistent with this article and until the legislature shall provide otherwise."[5]

It has been said that the provisions for proving exceptions, both under section 652 of the Code of Civil Procedure and section 1174 of the Penal Code, being merely incidental to appeal, fall within the meaning of this clause of the constitution, and that proceedings under these sections, and all others relating to the mode of presenting appeals or stay of proceedings pending appeal, are properly cognizable in the "district court of appeal having jurisdiction under the constitution of the particular cause by direct appeal from the trial court."[6] This construction of the constitutional provision under consideration has been twice applied to proceedings to prove exceptions in criminal cases under section 1174 of the Penal Code,[7] and, as already indicated, would seem equally applicable to proceedings to prove exceptions in civil cases under section 652 of the Code of Civil Procedure.[8]

§ 304. Application in General.—Section 652 of the Code of Civil Procedure has no application except where the judge has refused to allow an exception which he has the power to allow.[9] Consequently, it does not apply where the moving party seeks to insert in the bill of exceptions matter which is not within the proper scope of the bill;[10] or when an attorney representing the petitioner has waived the petitioner's right to except;[11] or where the judge, after erroneously sustaining an objec-

5. Const. Cal., art. VI, § 4, amendment adopted November 8, 1904.

6. Glass v. Lawlor, 152 Cal. 602, 93 Pac. 490.

7. People v. Lapique, 154 Cal. 518, 98 Pac. 257; Glass v. Lawlor, 152 Cal. 602, 93 Pac. 490.

8. Glass v. Lawlor, 152 Cal. 602, 93 Pac. 490.

9. Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500.

10. Wagner v. Weinzer, 59 Cal. Dec. 424, 189 Pac. 435.

11. Estate of Ross, 136 Cal. 629, 69 Pac. 430.

tion, later overruled it, leaving no point to the exception taken from the original ruling.[12] Furthermore, the supreme court will not proceed to settle a bill which the judge of the court below properly refused to settle, and therefore will decline to settle a bill which does not contain proof of the service of notice on the adverse party.[13]

Moreover, section 652 does not apply where there is a dispute between the attorney for the party seeking the bill and the presiding judge as to what evidence was introduced,[14] for on this question the determination of the judge, evidenced by the bill or statement settled by him, is conclusive.[15] If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character and under his judicial oath, cannot be overcome by the contradictory statement of somebody else, it must be put into the large class of evils (real or imaginary) which the supreme court has no jurisdiction to remedy.[16] Nevertheless, under section 652, the court may grant a request, in an election contest, that ballots which have been introduced in evidence and which are sufficiently identified be certified as a part of the bill of exceptions.[17]

§ 305. Refusal of Settlement.—Section 652 of the Code of Civil Procedure was not intended to apply, and does not apply, to the case where a trial judge has refused to settle a bill of exceptions.[18] The contention that it

12. People v. Scott, 91 Cal. 563, 27 Pac. 930.

13. Gallardo v. Atlantic & Pacific Tel. Co., 49 Cal. 510.

14. Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500.

15. Jennings v. Brown, 109 Cal. 290, 41 Pac. 1085.

16. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092; Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500.

17. Jennings v. Brown, 109 Cal. 290, 41 Pac. 1085.

18. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098; Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500; Hyde v. Thornton (Boyle), 83 Cal. 83, 23 Pac. 126; Landers v. Landers, 82 Cal. 480, 23 Pac. 126. The same is true of statements. Tibbetts v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174.

does so apply has been repeatedly and distinctly overruled in the cases in which it has been held that for such refusal the remedy is by mandamus.[19] All that the statute provides is, that when the judge has refused to allow an exception according to the facts—that is to say, when he has refused to allow that a particular ruling was made and excepted to, when in fact it was made and excepted to—the party aggrieved may then apply to the supreme court to prove that he did reserve an exception to such ruling, and in that connection, and as a necessary incident, may prove and have allowed the evidence and other matters material to the exception.[20] It refers solely to a case where the judge is charged with having refused to allow an exception; that is, where a party claims that he made "an objection upon a matter of law to a decision made" by the court, and took an exception to the decision, and the court refused to certify, in a bill or statement, that such an exception was taken, or that such an occurrence took place. In such a case, the party may prove, if he is able, in the supreme court, that he did take such exception, and may prove, no doubt, in that connection, sufficient surrounding facts to show what the point of the exception is.[1]

§ 306. **Preparation of New Bill.**—The duty and power of settling bills of exception rest generally and properly in the judge of the trial court. The supreme court can interfere only in the cases provided by statute, and the only case thus provided is found in section 652 of the Code of Civil Procedure.[2] It is not the purpose of this provision to require the supreme court to discharge the duties of the judge of the court below,[3] and since the

19. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098. And see supra, § 296 et seq.

20. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

1. Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500.

2. In re Gates, 90 Cal. 257, 27 Pac. 195; Hyde v. Boyle, 86 Cal. 352, 24 Pac. 1059.

3. Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Gallardo v. Atlantic & P. Tel. Co., 49 Cal. 510.

power of the supreme court must be confined within the limits prescribed by the code,[4] it follows that the supreme court cannot substitute itself for the court below in the settlement of a general bill of exceptions.[5] It is not the meaning of the code that the supreme court, with a few general averments before it about the conduct in the premises of the judge of the trial court, will put itself generally in the place of that court and proceed to construct an original and complete bill of exceptions.[6] Thus, it has been held that the supreme court has no power to remodel a bill of exceptions by striking out matters contained therein on the ground that they are incorrectly stated,[7] or by adding other matters thereto which may have been improperly omitted,[8] or by reviewing the determination of the trial judge as to the allowance of proposed amendments to the bill.[9] And when an exception to a particular ruling has been allowed, the supreme court has no authority to strike out any evidence or other matters stated in connection with such ruling upon the ground that such evidence was not given, or that such matters are untruly or incorrectly stated; and it is equally without authority to add to the statement of the ruling and exception contained in the settled bill any evidence or other matters which may be alleged to have been improperly omitted therefrom.[10] The final result of all the decisions is that when a bill of exceptions has been settled by the trial judge, the bill so settled is complete

4. Hyde v. Boyle, 86 Cal. 352, 24 Pac. 1059.

5. Hyde v. Thornton (Boyle), 83 Cal. 83, 23 Pac. 126.

6. Landers v. Landers, 82 Cal. 480, 23 Pac. 126.

7. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098; Hyde v. Boyle, 86 Cal. 352, 24 Pac. 1059. The same is true of statements. Cox v. Delmas, 92 Cal. 652, 28 Pac. 687.

8. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

9. In re Gates, 90 Cal. 257, 27 Pac. 195.

10. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098. Evidence of the improper omission or inclusion of matters is immaterial in a hearing on the petition for settlement. Beatty, C. J., reporting as referee in Estate of Dolbeer, 147 Cal. 569, 82 Pac. 192.

and unchangeable as to every exception therein contained. If the judge has put in incorrect statements of evidence or other matters bearing upon his rulings, or has omitted evidence or other matters claimed to be material, the evil is not remediable in the appellate court.[11]

§ 307. **Procedure in General.**—The supreme court has prescribed no formal regulations governing applications to prove exceptions,[12] but the result of the California cases has been to indicate the proper practice.[13] As soon as the trial judge has concluded the settlement of the proposed bill of exceptions and directed its engrossment with the omission of an exception or exceptions which the party seeking the allowance of the bill claims to have reserved, the right to apply to the supreme court for relief under section 652 of the Code of Civil Procedure has accrued, and the application should be made with reasonable promptitude.[14] Notice of the application should be served on the judge,[15] and also on the attorney of the adverse party.[16] The party seeking the allowance of exceptions which the trial judge has refused to allow must present his whole case in his original petition, or at least before a hearing upon a reference to take the testimony and report, for amendments to the petition will not be allowed thereafter. The whole proceeding is anomalous, and when conducted in the most methodical and expeditious manner makes a demand upon the time of the supreme court, which interferes most seriously with the

11. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098 (per Beatty, C. J.).

12. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098; Landers v. Landers, 82 Cal. 480, 23 Pac. 126 (holding that rule XXIX of the supreme court is not applicable); Estate of Hawes, 68 Cal. 413, 9 Pac. 456.

13. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

14. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098 (holding, however, that a delay of more than two months was excusable in view of the facts).

15. People v. Bitancourt, 73 Cal. 1, 14 Pac. 372; Estate of Hawes, 68 Cal. 413, 9 Pac. 456.

16. People v. Bitancourt, 73 Cal. 1, 14 Pac. 372.

performance of its more legitimate and more imperative duties as defined by the constitution.[17]

§ 308. Contents of Petition.—It cannot be held that a judge has refused to allow an exception unless it is shown that he has been properly requested to allow it, and, therefore, the petition for leave to prove an exception should show that the petitioner has taken the proper steps to procure the settlement of a bill of exceptions; that he included in his proposed bill a statement of the particular exception which he desires to prove; and that the judge in settling the bill refused to allow that he had taken such exception.[18] Where it is not averred in the petition that the court refused to allow the exceptions mentioned, but it merely appears that there were slight and immaterial differences between the petitioner and the judge as to the precise circumstances under which the exceptions were taken, the petition will be denied.[19] The petition should set forth the statements of the bill as settled by the judge of the trial court, which are alleged to be contrary to the facts, together with a statement of the facts and the point of the exceptions. A mere statement in the petition that the bill as settled by the trial judge does not state sufficient of the testimony of witnesses to explain the questions to which objections or exceptions were taken, is insufficient.[20]

The petitioner should set forth fully and specifically the very exception or exceptions which he presented to the judge, and which he avers the judge wrongfully refused to put into the bill; and also, the evidence upon which he bases the truth of his proposed exceptions, so that the supreme court can see on the face of the petition what

17. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098 (per Beatty, C. J.).

18. Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

19. People v. Scott, 91 Cal. 563, 27 Pac. 930.

20. In re Biddel, 75 Cal. 229, 19 Pac. 181.

his alleged grievance is.[1] This requires only a general statement of the tendency of the evidence, so that the materiality of the ruling alleged to have been excepted to may appear.[2]

Where the original petition is held insufficient because it does not include the exceptions taken and evidence in support thereof, and leave is given to file an amended petition, the amended petition is sufficient if it has annexed thereto, and made a part thereof as an exhibit, a writing containing the evidence, rulings and exceptions taken in the court below.[3]

§ 309. Determination and Settlement.—Where a petition for settlement by the supreme court presents a direct issue as to the accuracy of the bill as settled, the petitioner should be allowed to prove the truth of the issue, and a commissioner of the court may be appointed to take the proofs and report the same with his findings thereon.[4]

A petition for leave to prove an exception will be denied where it appears, from the evidence upon an issue of fact as to the alleged matter of exception taken before a referee appointed by the supreme court, that the allegations of the petition are not established by the preponderance of evidence.[5] Moreover, where the evidence is directly conflicting as to whether the exceptions in question were taken, the supreme court cannot hold that the superior judge erred or abused his discretion in not allowing them, and would not be warranted in holding that they should be included in the bill.[6]

1. Landers v. Landers, 82 Cal. 480, 23 Pac. 126; People v. Bitancourt, 73 Cal. 1, 14 Pac. 372; Estate of Hawes, 68 Cal. 413, 9 Pac. 456.

2. People v. Bitancourt, 73 Cal. 1, 14 Pac. 372.

3. Estate of Hawes, 2 Cal. Unrep. 656, 11 Pac. 220.

4. Curran v. Kennedy, 3 Cal. Unrep. 259, 24 Pac. 276. This commissioner may be a justice of the supreme court. See report of Beatty, C. J., in Estate of Dolbeer, 147 Cal. 569, 82 Pac. 192.

5. Crow v. Minor, 85 Cal. 214, 24 Pac. 640.

6. People v. Scott, 121 Cal. 101, 53 Pac. 364.

On the other hand, if the petitioner succeeds in making his proof, his exception will be put into a bill, certified by the supreme court through its chief justice, and filed with the clerk below, where it will take its place among the other things which constitute the record on appeal.[7] It should be noted, however, that where the parties file written consent to changes in the proposed bill, a settlement by the supreme court is unnecessary, and the proceeding will be dismissed without prejudice to a further application in the event the changes consented to are not in fact made.[8]

VI. Original Method of Preparing Transcript.

In General.

§ 310. Use and Necessity.—Causes brought before the court on appeal are heard on a transcript of the record of the court below or a portion thereof, the transcript being made up and the documents of which it is composed being authenticated before it reaches the appellate court.[9] The transcript on appeal is but the statutory method of bringing to the attention of the court the particular proceedings which took place in the trial court and which the appellate court is asked to review, and this is the sole purpose and function of the transcript.[10]

Whether the appeal itself is taken by the original method or by the alternative method, the transcript may be prepared by the original method,[11] for the alternative

7. Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500; Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

8. Powell v. Powell, 176 Cal. 676, 170 Pac. 147.

9. Bonds v. Hickman, 29 Cal. 460.

10. Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711.

11. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435; Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100 (the leading case); Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023 (in opinion of the supreme court, denying hearing); Nezik v. Cole, 29 Cal. App. Dec. 723, 184 Pac. 523.

method of appeal is independent from the alternative method of preparing the record on appeal.[12]

The statute makes it the duty of the appellant to furnish the transcript, and it is his duty to furnish a complete transcript, clean, properly arranged, and properly authenticated.[13] Portions of the record which have been accidentally omitted may be corrected on suggestion of diminution of the record,[14] but where such a diminution has been suggested and an order issued directing the clerk to certify up the part desired, it is still the duty of the appellant to see that the order is complied with. Until he does so, he has not furnished the court with the transcript which the law contemplates and requires him to furnish.[15]

§ 311. Single Transcript for Several Appeals.—Where several appeals are taken in one case by the same party, only one transcript is required, provided the record upon which each appeal is heard is as clearly distinct as if set forth in a separate transcript.[16] Indeed, a single transcript is permissible even where there are separate, independent appellants.[17] There is no rule, however, providing for an order of court requiring that two appeals be heard on a single transcript, and if one appellant declines to stipulate that a single transcript be used, he cannot complain if the costs of the second transcript are assessed against him.[18] Furthermore, it is not permissible to stipulate that the relevant parts of a transcript filed in one case

12. See infra, § 338.

13. Kimball v. Semple, 31 Cal. 657.

14. See infra, § 385.

15. Kimball v. Semple, 31 Cal. 657, per Sawyer, J.

16. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187 (holding that People v. Center, 61 Cal. 191, is not authority for the contrary rule).

17. Estate of Bell, 157 Cal. 528, 108 Pac. 497, referring to the practice allowed in Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

18. Estate of Bell, 157 Cal. 528, 108 Pac. 497.

may be considered in another case, for under this mode the work of counsel is imposed on the appellate court.[19]

Appeal from judgment and denial of new trial.—Under the former practice, where an appeal was taken from a judgment, and also from an order denying a motion for new trial, only one transcript was required, even if the appeals were taken at different times, and even in the absence of an order or stipulation to this effect.[20] This result followed from a rule of the supreme court which provided that "an appeal from a judgment and from any order denying a new trial of the issues may in all cases be presented upon the same transcript."[1]

§ 312. Use of Transcript of Another Party.—Where two parties to an action prosecute separate appeals from the judgment or decision therein, the transcript prepared by one party cannot be used in the consideration of the appeal taken by the other, in the absence of a stipulation to that effect or a consolidation of the appeals.[2] As the reason for this rule, it has been said that each party taking an appeal must present his own record with especial reference to the errors of which he complains. The respondent can only be called upon to respond to the record which the appellant serves upon him and files in the case. If that record does not present all of the record in the court below favorable to his side, he has the opportunity to correct it by suggesting a diminution of the record. He would have no opportunity to protect himself if, after briefs have been filed, he should find the cause

19. Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091.

20. Rauth v. Southwest Warehouse Co., 158 Cal. 54, 109 Pac. 839; Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102.

1. Rule II of the supreme court; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii. This rule was omitted from the rules as stated in 1919 (177 Cal. xliii, 176 Pac. vii), in view of the fact that orders denying motions for new trial are no longer appealable. See supra, § 34.

2. Gates v. Walker, 35 Cal. 289; Fair v. Stevenot, 29 Cal. 486.

argued, not on the transcript served on him and filed in the cause, but upon the record in some other appeal prepared with reference to other errors, which may in no way affect him, and which he may in fact know nothing about.[3] By application of this rule it has been held that if the plaintiff and defendant each appeal from different portions of the same judgment and the causes are not consolidated in the appellate court and the parties do not stipulate that either transcript may be added to the other, the appeal of the plaintiff must be heard on the transcript filed therein, without the aid of that filed in the appeal taken by the defendant.[4]

Sufficiency of Matters Included.

§ 313. **In General.**—Sections 950, 951 and 952 of the Code of Civil Procedure provide that the appellant must furnish copies of certain papers to the appellate court, and these papers must be set out in and become a part of the transcript.[5] On an appeal from an order made after final judgment, the transcript should contain a copy of the order appealed from, and copies of all the papers used in the hearing when the order was made by the court below.[6] Upon an appeal from an order dissolving an injunction, the order must be furnished in the transcript.[7]

But where the appeal is taken on the judgment-roll, without a bill of exceptions, or substitute therefor, matters which are not a part of the judgment-roll constitute no part of the record on appeal,[8] and have no place in the transcript.[9] A copy of the minutes of the

3. Gates v. Walker, 35 Cal. 289, per Sawyer, C. J.

4. Fair v. Stevenot, 29 Cal. 486.

5. San Francisco & N. P. R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517. (The code sections referred to are set forth supra, § 229.)

6. Glidden v. Packard, 28 Cal. 649.

7. Kimple v. Conway, 69 Cal. 71, 10 Pac. 189 (citing Code Civ. Proc., § 951).

8. See supra, §§ 259–265.

9. Sutter v. San Francisco, 36 Cal. 112.

court, as kept by the clerk, should not be inserted in the transcript,[10] and neither should the undertaking on appeal,[11] nor memoranda of exceptions taken in the progress of the cause and signed by the judge.[12]

It is important that a transcript should not be swollen to unnecessary bulk, but should be sufficient to serve the purpose intended. Thus it has been said, on the one hand, that it is reprehensible, although common practice, to stuff a transcript with irrelevant and unnecessary matter.[13] Swelling the record by the insertion of useless material imposes an unnecessary labor on the court, and a great additional expense upon the parties, and cannot be too strongly condemned.[14] And it has been held, on the other hand, that an appeal will be dismissed where the transcript is so scanty that it would be useless to attempt an examination of the cause upon its merits and impossible to determine whether the error assigned exists or not.[15] The transcript should always contain enough of the record of the court below to present fully the question appealed and show the materiality of the point relied on to reverse the judgment or order.[16] The appellant is not authorized to leave out any portion unless upon stipulation of the other party. He is not authorized to assume that any part is immaterial and omit it.[17] Thus, where the transcript does not show that the findings of fact and conclusions of law have been signed by the judge or filed

10. Mendocino County v. Morris, 32 Cal. 145.

11. San Francisco & N. P. R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517.

12. Stone v. Stone, 17 Cal. 513.

13. Knowles v. Inches, 12 Cal. 212.

14. Conroy v. Duane, 45 Cal. 597. See, also, Harper v. Minor, 27 Cal. 107, where the court says that the costs of the unnecessary portion of the transcript may be visited on the party responsible therefor.

15. Miller v. Thomas, 78 Cal. 509, 21 Pac. 11; People v. Ward, 2 Cal. Unrep. 205.

16. McQuade v. Whaley, 29 Cal. 612.

17. Kimball v. Semple, 31 Cal. 657 (holding that a deed which was, without objection, made a part of a statement on motion for new trial must be included in the transcript).

with the clerk, or that judgment has been entered thereon, the appeal will be dismissed.[18]

§ 314. Judgment-roll.—It is required that on appeal from a final judgment the appellate court be furnished with a copy of the judgment-roll,[19] and it is provided that an appeal may be dismissed if the appellant fails to furnish the requisite papers.[20] Consequently, it has been held that a transcript which does not contain a copy of the judgment-roll is fatally deficient in that respect, and that an appeal thereon will be dismissed.[1] Nevertheless, it has been pointed out that it would be unjust to dismiss an appeal merely because some part of the roll has been, perhaps inadvertently, omitted from the transcript. If the omission be deemed material, the respondent can easily remedy the supposed defect by suggestion of a diminution of the record.[2]

Furthermore, it seems to be the rule that it is not necessary in all cases to bring up the entire judgment-roll in the transcript.[3] Thus, where an amended complaint and answer thereto form the issues tried, the original pleadings and summons may be omitted, as no question arises on them.[4] The practice often pursued by parties, or clerks, of copying into the transcript all the orders and minutes of the court below is reprehensible in the extreme. It only involves parties in expenses which are utterly useless, and imposes great labor on the appellate court in endeavoring to ascertain what part of the transcript is really before it.[5]

18. In re De Leon's Estate, 4 Cal. Unrep. 388, 35 Pac. 309.

19. Code Civ. Proc., § 950.

20. Code Civ. Proc., § 954.

1. Dorland v. Bernal, 3 Cal. Unrep. 75, 21 Pac. 435.

2. Paige v. Roeding, 89 Cal. 69, 26 Pac. 787 (approved in Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102); Hellings v. Duval, 119 Cal. 199, 51 Pac. 335.

3. Paige v. Roeding, 89 Cal. 69, 26 Pac. 787; Solomon v. Reese, 34 Cal. 28; Marriner v. Smith, 27 Cal. 649 (referring to amendment of 1864 to Practice Act, § 346).

4. Marriner v. Smith, 27 Cal. 649.

5. Harper v. Minor, 27 Cal. 107.

Nevertheless, under the former practice, it was required, on an appeal from an order denying a motion for a new trial, that the judgment-roll, or at least a copy of the final judgment, be in the transcript.[6] And where an appeal is taken from a judgment, or from an order made after final judgment, the transcript must contain the judgment,[7] and the pleadings,[8] or the appeal will be dismissed.[9]

§ 315. Condensation of Papers and Evidence.—In many cases a summary statement of papers and evidence is sufficient. Thus, it has been said that the transcript should state briefly the substance and effect of conveyances and records, instead of inserting them at full length.[10] Similarly the courts advise that the transcript state only so much of the substance of the evidence as relates to the errors assigned, instead of copying verbatim the testimony of numerous witnesses by questions and answers.[11] There is no sense in copying a judgment, execution and the like in cases where no question arises as to the form, or the particular words of them; but a short description of the paper, giving the sums, date, court, etc., is sufficient.[12] The use of a skeleton transcript is discussed in a subsequent section.[13]

Headings, indorsements, and verifications.—Where there are numerous papers in the record, it is not necessary to repeat in each case the style of the court and title of the cause, nor the indorsements upon each paper filed, nor the verifications in full. It is sufficient, when

6. Kimple v. Conway, 69 Cal. 71, 10 Pac. 189.

7. Savings & Loan Society v. Meeks, 66 Cal. 371, 5 Pac. 624; Schaefer v. French Sav. & Loan Society, 2 Cal. Unrep. 108.

8. Hart v. Plum, 14 Cal. 148.

9. Savings & Loan Society v. Meeks, 66 Cal. 371, 5 Pac. 624; Hart v. Plum, 14 Cal. 148.

10. Conroy v. Duane, 45 Cal. 597.

11. Conroy v. Duane, 45 Cal. 597. As to the similar rule with respect to bills of exceptions, see supra, § 271.

12. Knowles v. Inches, 12 Cal. 212.

13. See infra, § 320.

the style of the court and title of the cause is given in the first paper, to afterwards give the name of the document and at the head say, "Title of cause;" and where a paper is verified or acknowledged, and no point is made on the verification or acknowledgment, to say, "Duly verified," or "Duly acknowledged." The date of the paper, date of filing, date of service, etc., and every indorsement that may be important, should, of course, appear. The rest may, with advantage, be omitted.[14]

§ 316. Effect of Stipulations.—Stipulations of the parties frequently specify that the transcript is correct, or that it is sufficient. The effect of these stipulations upon the sufficiency of the transcript is discussed in this section; their effect upon its correctness being reserved for a later section.[15]

Where the respondent stipulates to the sufficiency of the transcript, he is bound thereby. Thus, it has been held that an objection that necessary papers are omitted is completely answered by a stipulation of counsel that the transcript contains all that is necessary for the purposes of appeal.[16] Similarly, it has been held that a stipulation that "the plaintiff duly excepted" will be construed as a stipulation that the exceptions were sufficiently specified to render them available.[17]

Nevertheless, the fact that the respondent has stipulated to the correctness of the transcript does not preclude him from objecting to the sufficiency thereof.[18] As the reason for this rule, it has been said that such a stipulation is but a substitute for the clerk's certificate to the correctness of the transcript. It simply shows that

14. Marriner v. Smith, 27 Cal. 649; Estate of Boyd, 25 Cal. 511.

15. See infra, § 323.

16. Solomon v. Reese, 34 Cal. 28.

17. Bowman v. Cudworth, 31 Cal. 148.

18. Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Siebe v. Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14; Todd v. Winants, 36 Cal. 129; Wetherbee v. Carroll, 33 Cal. 549; Cawer v. San Joaquin Cigar Co., 16 Cal. App. 761, 118 Pac. 92.

it is a transcript of such record of the proceedings as has been, in fact, made in the court below. The record itself may be sufficient or insufficient under the law to authorize the appellate court to review the action of the court below. A stipulation may, of course, do more than authenticate the transcript as a true copy of the record below, but when attorneys design to so stipulate, they should do so in terms not to be misunderstood.[19]

Furthermore, a party who has stipulated that the transcript is correct and that the appeal may be heard thereon may perfect the judgment-roll contained therein by adding to it omitted matters properly belonging therein.[20] But the parties may not stipulate that matters contained in a transcript in one case may be read in connection with an insufficient transcript in another case, where, to do so, imposes on the appellate court the labor of culling out and determining pertinent matter in one transcript to make up the deficiencies of another.[1]

Form and Arrangement.

§ 317. Form in General.—The following rule of the supreme court regulates the form of the transcript:

"All transcripts of record, except in criminal cases and civil cases coming under the provisions of section 953a of the Code of Civil Procedure, shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin on the outer edge not less than two inches wide. The printed pages, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition allowed."[2]

19. Wetherbee v. Carroll, 33 Cal. 549, per Sawyer, J.

20. California Wine Assn. v. Commercial Union F. Ins. Co., 159 Cal. 49, 112 Pac. 858.

1. Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091.

2. Rule VII of the supreme court, subd. 1; 177 Cal. xlix, 176 Pac. ix;

The effect of a deficiency in form appears to rest largely in the discretion of the court. Thus, where the appellant fails to comply with the rules of the supreme court relating to the mode of preparing the transcript, the judgment appealed from may be affirmed;[3] and where the transcript has no index, the appeal may be dismissed.[4] Similarly, where the lines of the transcript are not folioed, the appeal may be dismissed,[5] or it may, in the discretion of the court, be considered upon its merits.[6] Even if a defect in form is insufficient in itself to furnish a ground for dismissal, it may be considered in connection with other grounds.[7]

§ 318. **Printing and Interlineations.**—A transcript prepared under the original method, unlike a transcript prepared under the alternative method,[8] must be printed,[9] for the code sections authorizing a typewritten transcript under the alternative method have no application to a bill of exceptions or statement settled by the trial judge.[10] An early rule of the supreme court provided that the transcript should "be written in a fair, legible hand,"[11] but this was changed in 1864, and the requirement of a printed transcript has been in force continuously since that year.[12] It was thought, in making this change, that the printing of transcripts would greatly facilitate the examination and hasten the decisions of

160 Cal. xli, 117 Pac. ix. The same rule, omitting the exceptions stated, was declared as rule VII in 144 Cal. xliv, 79 Pac. vii, and in 130 Cal. xxxix, 64 Pac. vii; and was declared as rule V, subd. 1, in 64 Cal. 635, 52 Cal. 677, 41 Cal. 695, 37 Cal. 705, 28 Cal. 686, and 26 Cal. 693.

3. Douglas v. Fulda, 54 Cal. 588.

4. Kellogg v. Mayer, 54 Cal. 583.

5. Kellogg v. Mayer, 54 Cal. 583.

6. Naylor v. Adams, 15 Cal. App. 548, 115 Pac. 335.

7. Green v. McMann, 79 Cal. 561, 21 Pac. 964.

8. See infra, § 357.

9. Rule VII of the supreme court (see supra, § 317).

10. Title Land Co. v. Schaefer, 41 Cal. App. 294, 182 Pac. 463.

11. Rule X of the supreme court, 11 Cal. 408.

12. See present rule VII and former rule V, as cited supra, note to § 317.

causes, as well as lessen the liability of judges to overlook or misapprehend important facts, and would facilitate the preparation and references of counsel.[13]

Written interlineations in the transcript of the record, however, are not ground for dismissing the appeal,[14] at least when they do not render the transcript difficult to read or understand,[15] although they may be considered in connection with other grounds.[16] Where the printed transcript contains numerous interlineations and writings in the margins, it seems that the court will look only to the printed transcript, certified by the clerk to be correct.[17] If interlineations and alterations are to be regarded, the certificate should show that they were in the transcript when the certificate was given. Any other rule would subject a record to most dangerous alterations or mutilations.[18]

§ 319. Arrangement and Indexing.—The following rule of the supreme court regulates the arrangement and indexing of transcripts:

"The pleadings, proceedings, and statement shall be chronologically arranged in the transcript. Each printed transcript and also the printed parts of a typewritten record, shall be prepared with an alphabetical index, specifying the page of each paper, order, or proceeding, and stating the character of each exhibit, and the page beginning the examination, cross-examination and redirect examination, or recall of each witness. . . . For any failure to observe this rule, the court may, of its own motion, order a proper index to be supplied . . . , or, for failure of the appellant, dismiss the appeal. The clerk is di-

13. Estate of Boyd, 25 Cal. 511.

14. Fogel v. Schmalz, 83 Cal. 202, 23 Pac. 294; Clarke v. Mohr, 6 Cal. Unrep. 378, 59 Pac. 825; White v. White, 3 Cal. Unrep. 265, 24 Pac. 276; Madden v. Occidental & Oriental S. S. Co. (Cal.), 24 Pac. 169.

15. Fogel v. Schmalz, 83 Cal. 202, 23 Pac. 294.

16. Green v. McMann, 79 Cal. 561, 21 Pac. 964.

17. Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24.

18. Green v. McMann, 79 Cal. 561, 21 Pac. 964.

rected to refuse to receive for filing any transcript . . . which does not contain the index herein required."[19]

There is no authority, except this rule, for dismissing an appeal for confusion in the transcript.[20] Even under the rule, the court may, in its discretion, give counsel an opportunity to correct an error of arrangement or indexing instead of dismissing the appeal,[1] or may content itself with criticism of the transcript and review the appeal upon its merits.[2] Nevertheless, it has been pointed out that reasonable attention upon the part of counsel, in the first instance, to perspicuity of arrangement of the record would greatly lessen the subsequent labors, both of themselves and of the court.[3] And it has been said that when the transcript does not indicate where testimony objected to may be found, it will be assumed that the objection is not of merit or importance.[4]

§ 320. **Miscellaneous Matters**—*Indorsement on cover.*—A rule of the supreme court provides:

"There shall be indorsed upon the cover of the transcript the name of the county from which the appeal is taken, and also the name of the judge whose decision is presented for review and the names and addresses of the attorneys representing the parties to the appeal."[5]

19. Rule VIII of the supreme court as amended 1921. For earlier statements of a similar rule, see 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii; 64 Cal. 635; 52 Cal. 677. This rule was declared as rule VI in 41 Cal. 695, and the first part alone was declared as rule VI in 37 Cal. 705, 28 Cal. 686, and 26 Cal. 693.

20. Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187.

1. Martin v. Hudson, 79 Cal. 612, 21 Pac. 1135; Donahue v. Mariposa Land & Min. Co., 2 Cal. Unrep. 389, 4 Pac. 881 (want of index). In Kellogg v. Mayer, 54 Cal. 583, however, the appeal was dismissed for want of index and folio numbers.

2. Howe v. Johnson, 117 Cal. 37, 48 Pac. 978 (want of index); Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511 (want of folio numbers); Thompson v. Lynch, 43 Cal. 482 (faulty arrangement).

3. Thompson v. Lynch, 43 Cal. 482.

4. Dauphiny v. Buhne, 153 Cal. 757, 126 Am. St. Rep. 136, 96 Pac. 880.

5. Rule III of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix. The same rule,

The purpose of requiring the name of the judge is apparently to enable the appellate court to determine if the papers contained in the transcript have been properly certified.[6]

Title of cause.—It is not the practice in California to change the title of the case when it is appealed, so as to make the defendant in the court below appear as the plaintiff on appeal.[7] Such a course, being against usage, has a tendency to produce confusion, both on appeal and in the court below.[8] The case should therefore be entitled with the plaintiff's name first, even when the defendant is the appellant.[9]

Skeleton form.—A transcript is insufficient which contains a skeleton statement, in which material documents are not set forth, but are merely indicated by parenthetical reference, as "(here insert deed)."[10] It is sufficient, however, if, in addition to so referring to the documents, it sets them forth at the end of the statement.[11]

Incorporation of amendments.—It would be an inadmissible practice for the appellate court to select fragments from two insufficient transcripts in order to construct them into a sufficient paper.[12] The transcript should, therefore, in all cases be a single document, and amend-

omitting the portion referring to the names and addresses of attorneys, was stated in 144 Cal. xxxix, 79 Pac. vii.

6. See Finnall v. Merriam, 13 Cal. App. 609, 110 Pac. 462.

7. Peregoy v. McKissick, 79 Cal. 572, 21 Pac. 967; Peregoy v. Sellick, 79 Cal. 568, 21 Pac. 966; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237; Williams v. Hall, 79 Cal. 606, 21 Pac. 965; Knock v. Bunnell, 3 Cal. Unrep. 105, 21 Pac. 961.

8. Williams v. Hall, 79 Cal. 606, 21 Pac. 965; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237.

9. Peregoy v. McKissick, 79 Cal. 568, 21 Pac. 966.

10. Kimball v. Semple, 31 Cal. 658.

11. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131 (distinguishing Thompson v. Patterson, 54 Cal. 542, Bush v. Taylor, 45 Cal. 112, People v. Bartlett, 40 Cal. 142, and Kimball v. Semple, 31 Cal. 657, as cases where the documents referred to were not set forth in the transcript).

12. Kimball v. Semple, 31 Cal. 658.

ments to a proposed statement,[13] or to a proposed bill of exceptions,[14] should therefore be incorporated in the proper place in the draft, and should not be set forth in a separate document. It is insufficient that the amendments are proposed for insertion at sundry places designated by reference to numbers of lines and pages in the original draft, at least where there is nothing in the transcript to indicate the point of insertion.[15]

Certification of Correctness.

§ 321. In General.—The Code of Civil Procedure provides that the transcript "must be certified to be correct by the clerk or the attorneys."[16] In view of this section, a transcript which is not certified by the clerk or the attorneys cannot be reviewed,[17] and the appeal may be dismissed on motion of the respondent.[18] Nevertheless, where the respondent moves to dismiss the appeal on the ground that the transcript has not been properly authenticated, the appellant may remove the ground of the objection by filing a properly authenticated transcript at the hearing of the cause.[19] Thus, it has been said that an

13. Baldwin v. Ferre, 23 Cal. 462; Skillman v. Riley, 10 Cal. 301; People v. Edwards, 9 Cal. 286; Marlow v. Marsh, 9 Cal. 259.

14. Fritsch v. Stampfli, 117 Cal. 441, 49 Pac. 559. See supra, § 275, as to proposal of amendments generally.

15. Fritsch v. Stampfli, 117 Cal. 441, 49 Pac. 559.

16. Code Civ. Proc., § 953. As to the requirement of a certificate that a undertaking has been filed or a stipulation, see supra, § 247. As to the rule taxing costs of obtaining the clerk's certificate upon the respondent if his attorney refuses his certificate, see COSTS.

17. Estate of Medbury, 48 Cal. 83; Ellis v. Bennett, 2 Cal. Unrep. 302, 3 Pac. 801.

18. In re Wierbitszky, 88 Cal. 333, 26 Pac. 174; Snipsic Co. v. Riverside Music Co., 6 Cal. App. 115, 91 Pac. 747 (dismissal without prejudice).

19. Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214; In re Ryer, 110 Cal. 556, 42 Pac. 1082; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986. The same rule applies where the certificate is insufficient as to the filing of the undertaking: Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237. In Ellis v. Bennett, 2 Cal. Unrep. 302, 3 Pac. 801, it is

informality in the certificate of the transcript is not ground for dismissal if the appellant later produces a proper certificate.[20] So, also, where there is no certificate to the transcript, and nothing to show that the papers in what is called the transcript are copies of the originals on file in the court below, the court may, on motion of the appellant, grant an order directing the clerk of the lower court to attach a proper certificate; and it may later, on failure of the appellant to furnish the certificate, dismiss the appeal.[1] The want of certification cannot be cured, however, by an affidavit of the appellant averring that "the said transcript as the same is now of record is in all respects true and correct."[2]

§ 322. **Certificate of Clerk.**—No discretion is vested in the clerk or the lower court as to the certification of the transcript by the clerk. Whether the documents submitted for certification will constitute, when certified, a transcript of appeal, is a question which a clerk of a court cannot determine. It is his duty to certify to the correctness of the documents in the transcript, if they are correct copies of the originals in his custody, and transmit the same to the appellate court.[3] Furthermore, after an appeal is taken, the lower court loses, and the appellate court acquires, jurisdiction. Consequently, the lower court has no power to forbid its clerk to certify to the transcript, and the appellate court may order that such a certificate be made.[4] Indeed, the appellate court is

said that certificates of the presiding judge and clerk, made after the service and filing of notice of motion to dismiss the appeal, did not supply the defects in the transcript. These defects, however, were not only want of certification, but also defective notice of appeal and want of proof of service of the transcript.

20. Hellings v. Duval, 119 Cal. 199, 51 Pac. 335.

1. In re Wierbitszky, 88 Cal. 333, 23 Pac. 174.

2. Snipsic Co. v. Riverside Music Co., 6 Cal. App. 115, 91 Pac. 747.

3. People v. Center, 54 Cal. 236.

4. People v. Center, 54 Cal. 236, citing Buckman v. Whitney, 28 Cal. 555, and Baggs v. Smith, 53 Cal. 88.

not bound by the certificate of the clerk as to the correctness of the record.[5] On the contrary, it may, when necessary, compel him to correct his certificate and to transmit a proper record;[6] although it seems that mandamus will not lie to compel certification.[7] Similarly, the appellate court is not bound by the clerk's certificate that a proper undertaking has been duly filed.[8] Under a former rule, providing that the transcript might be certified by the clerk where the parties did not agree, it was held that the clerk might certify, although the transcript had not been first submitted to the attorney for the respondent.[9]

§ 323. Certificate of Attorneys.—The code section requiring a certification of the transcript places the certificate of the attorneys upon the same plane as the certificate of the clerk.[10] The object of the rule allowing attorneys to stipulate to the correctness of the transcript is to enable the attorney for the appellant, with the consent of the opposite attorney, to make up the record and omit all useless and superfluous matter.[11] Where the counsel for respondent has stipulated that the transcript is correct, he cannot be heard to impeach it by showing the entry of judgment at another and later date.[12] Where he has stipulated that depositions may be considered as a part of a statement on motion for new trial or on appeal, he cannot assert the strict requirement of the statute with respect to setting out these depositions in the statement.[13]

5. See infra, § 390.

6. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147. Compare with In re Wierbitszky, 88 Cal. 333, 26 Pac. 174, where the appellate court ordered the clerk to attach a proper certificate.

7. See infra, § 389.

8. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147. Neither is it bound by a stipulation to this effect. Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411.

9. Estate of Boyd, 25 Cal. 511, referring to rule IX as then existing.

10. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147 (referring to Code Civ. Proc., § 953); Bonds v. Hickman, 29 Cal. 461.

11. Estate of Boyd, 25 Cal. 511.

12. Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888.

13. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26.

It must be remembered, however, that a stipulation that the transcript is correct is only equivalent to the certificate of the clerk, and does not deprive the party stipulating of the right to question the sufficiency of the matters included.[14] Again, it is obvious that a stipulation agreeing to the transcript not signed by the counsel of all of the parties to the appeal is insufficient.[15]

§ 324. Sufficiency of Certificate.—Several cases have passed on the sufficiency of certificates as to the correctness of the transcript.[16] Thus, it has been held that a certificate is sufficient which states that the copies of the papers included within the transcript as printed are true and correct copies of the original papers on file in the case.[17] A stipulation signed by the attorneys that the papers contained in the transcript "are true and correct copies of the original papers on file in said action" is a sufficient authentication.[18] Again, a certificate of the clerk that "The foregoing are full, true, and correct copies of originals on file and of record in my office, and that the foregoing constitutes the transcript on appeal from the judgment and from the order of the court denying defendant's motion for a new trial," has been held sufficient in point of form.[19] It has been observed that it is no part of the duty of the clerk to certify that the papers contained in the transcript constitute the record on appeal, although it is the general practice and is proper for the clerk in his certificate to state that the transcript contains a copy of the judgment-roll. In the absence of such a certificate, it will be assumed that the pleadings, order, findings and judgment mentioned in the certificate are those which constitute the judgment-roll.

14. See supra, § 316.

15. Estate of Medbury, 48 Cal. 83.

16. See cases cited infra. Cases passing on the sufficiency of certificates as to the filing of an undertaking are discussed supra, § 247.

17. Meeker v. Hoffer, 57 Cal. 140.

18. Cordano v. Ferretti, 15 Cal. App. 670, 115 Pac. 657.

19. Pink v. Catanich, 51 Cal. 420.

If they do not, it is an easy matter for the respondent to have the record corrected.[20] Where the transcript contains erasures, interlineations, and marginal writings, the certificate should show that these were in the transcript when the certificate was given.[1]

Authentication of Papers Used Below.

§ 325. Necessity.—Unless the appellate court requires the clerk of the trial court to certify copies of papers used below,[2] it is axiomatic that papers not properly authenticated as having been used in a hearing resulting in a judgment or order or decree cannot be considered on appeal.[3] Where the record does not authenticate the

20. O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

1. Green v. McMann, 79 Cal. 561, 21 Pac. 964.

2. Code Civ. Proc., § 953a, as amended by Stats. 1919, p. 290 (see supra, § 233).

3. Regoli v. Stevenson, 179 Cal. 257, 176 Pac. 158; Hertel v. Emireck, 178 Cal. 534, 174 Pac. 30; Moore v. Pacific Coast Steel Co., 171 Cal. 489, 153 Pac. 912; Estate of Broome, 169 Cal. 604, 147 Pac. 270 (where Henshaw, J., makes the statement given in the text); Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Hershey v. Bristol, 162 Cal. 110, 121 Pac. 371; Matter of Danford, 157 Cal. 425, 108 Pac. 322; Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 19 Ann. Cas. 1230, 103 Pac. 320; Muzzey v. H. D. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; People v. Wrin, 143 Cal. 11, 76 Pac. 646; People v. Gay, 141 Cal. 41, 74 Pac. 443; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Esert v. Glock, 137 Cal. 533, 70 Pac. 479; San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; White v. White, 88 Cal. 429, 26 Pac. 236; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Peltret v. Frank, 66 Cal. 34, 4 Pac. 885; White v. Longmire, 63 Cal. 232; Angell v. Delmas, 60 Cal. 254; Walsh v. Hutchings, 60 Cal. 228; Nash v. Harris, 57 Cal. 242 (a leading case); Patterson v. Rutherford, 39 Cal. App. 647, 179 Pac. 704; Nason v. Feldhusen, 34 Cal. App. 789, 168 Pac. 1162; Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299; Boos v. Byrnes, 33 Cal. App. 755, 166 Pac. 596; Crofford v. Crofford, 29 Cal. App. 662, 157 Pac. 560; Cava-

papers used at the hearing below in the manner required by law, the appeal, if taken, whether under the old method or under the alternative method, is ineffectual.[4] In the absence of proper authentication, the appellate courts have in some cases granted a motion to dismiss the appeal.[5] The more appropriate order, however, is an affirmance of the order appealed from.[6]

The obvious purpose of authentication is to show upon what evidence or papers the court below made its order, and thus enable the reviewing court to determine whether, upon the record as made before it, the court below was legally authorized to make the order complained of.[7] There is no injustice to respondents in the requirement of authentication, although it may prevent the appellate court from considering their affidavits, for in the absence of a proper record showing error, the court will conclusively

naugh v. Carpenter, 28 Cal. App. 276, 152 Pac. 57; Pinto v. Seeley, 22 Cal. App. 318, 135 Pac. 43; Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878; Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801; Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548; Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564; Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459; Willow Land Co. v. Goldschmidt, 11 Cal. App. 297, 104 Pac. 841; McDonnell v. McDonnell, 10 Cal. App. 63, 101 Pac. 40; Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344; Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463; O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576; Weiner v. Korn, 2 Cal. Unrep. 342, 4 Pac. 373.

4. Borges v. Dunham, 169 Cal. 83, 145 Pac. 1011; Uhn v. Prather, 29 Cal. App. 92, 154 Cal. 611.

5. Muzzey v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; White v. White, 88 Cal. 429, 26 Pac. 236; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564; Fisher v. Western Fuse Co., 12 Cal. App. 299, 107 Pac. 332; Willow Land Co. v. Goldschmidt, 11 Cal. App. 297, 104 Pac. 841.

6. Huntington Land Co. v. Wallace, 179 Cal. 179, 175 Pac. 695; Borges v. Dunham, 169 Cal. 83, 145 Pac. 1011; Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526 (the leading case); Bamabee v. Hunstock, 29 Cal. App. Dec. 551, 183 Pac. 951; Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299; Ulm v. Prather, 29 Cal. App. 92, 154 Pac. 611; Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969.

7. Nason v. Feldhusen, 34 Cal. App. 789, 168 Pac. 1162.

presume that the order of the court below was based on affidavits sufficient to justify it.[8]

§ 326. Method Generally.—There was formerly great difficulty and confusion as to the proper mode of authenticating papers used on the hearing below.[9] The code provides no special mode by which the papers used on the hearing below shall be identified,[10] and originally, although there was no rule of the supreme court on this subject,[11] two methods of authentication were allowed: the first, incorporation of the papers in a bill of exceptions;[12] the second, certification by the trial judge.[13]

Adoption of rule XXIX.—Later, the court challenged the validity of this second method of authentication and declared the advisability of adopting a rule of court covering the question.[14] Immediately afterward,[15] and as a consequence thereof,[16] the supreme court adopted the following rule:

"In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."[17]

8. Skinner v. Horn, 144 Cal. 278, 77 Pac. 904 (per Angellotti, J.; citing Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966, Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396, and Nash v. Harris, 57 Cal. 242).

9. People v. Terrill, 131 Cal. 112, 63 Pac. 141.

10. Baker v. Snyder, 58 Cal. 617.

11. Somers v. Somers, 81 Cal. 608, 22 Pac. 967; Henlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Schammel v. Schammel, 70 Cal. 72, 11 Pac. 497; Pieper v. Centinela Land Co., 56 Cal. 173.

12. See infra, § 328.

13. See infra, § 327.

14. Somers v. Somers, 81 Cal. 608, 22 Pac. 967; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299.

15. People v. Terrill, 131 Cal. 112, 63 Pac. 141.

16. Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522.

17. Rule XXIX of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii, was originally adopted as rule XXXII. People v. Terrill, 131 Cal. 112, 63 Pac. 141.

As no other mode of authentication was at first provided by law, inclusion of the papers in a bill of exceptions became the only method allowed.[18]

Adoption of alternative method of preparing record.—Still later, the legislature adopted the alternative method of preparing the record on appeal,[19] and it is now the rule that the papers used below may be authenticated either by including them in a bill of exceptions or in the reporter's transcript.[20] One method or the other must be followed, however,[1] for the practice under which the judge certifies to a bill of exceptions or reporter's transcript containing the papers used at the hearing, is simple and efficacious, and cannot with safety be departed from.[2] Accordingly, certification by the clerk is of no effect,[3] and the stipulation of the parties is sometimes regarded as insufficient.[4]

Limitations on rule.—The rule requiring the authentication of papers used below in a particular manner does not apply to papers which are themselves part of the judgment-roll.[5] Furthermore, it applies only where appeals are taken to those orders which are appealable.[6]

§ 327. Certificate of Judge.—In the absence of a rule specifying the method of authenticating papers used at the hearing below,[7] it was originally held that such authentication might be made by a certificate of the judge

18. See infra § 328.

19. See infra, § 336 et seq.

20. See infra, § 355.

1. Columbia Crude Oil Co. v. Deyo, 25 Cal. App. 268, 143 Pac. 243.

2. Fish v. Benson, 71 Cal. 428, 12 Pac. 454. The statement given in the text differs from that given by the court in substituting the recent reporter's transcript "for the obsolete statement," and in omitting certification by the judge.

3. See infra, § 329.

4. See infra, § 330.

5. Estate of Broome, 162 Cal. 258, 122 Pac. 470 (citing earlier cases); Estate of Kilborn, 162 Cal. 4, 120 Pac. 762; People v. Terrill, 131 Cal. 112, 63 Pac. 141; Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639.

6. Phenegar v. Paolini, 27 Cal. App. 381, 149 Pac. 1008.

7. See supra, § 326.

that the papers had been used by him.[8] Later, however, the court pointed out the advisability of declaring a rule on the subject, and suggested that authentication by bill of exceptions was the only proper method[9] and the rule requiring authentication by bill of exceptions, except where another mode of authentication is provided by law.[10] Since the adoption of this rule, it has been held, except for one case,[11] that certification by the judge is insufficient.[12] The certificate of the judge is not the equivalent of a bill of exceptions, for the certificate may be made ex parte.[13]

There was no decision as to when the judge must have made his certificate,[14] but the supreme court suggested to members of the bar that they request the judge, at the hearing, to indorse each affidavit or other document as having been used upon the motion.[15]

8. Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966 (citing Somers v. Somers, 81 Cal. 608, 22 Pac. 967, which is doubtful authority for this proposition); Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Hefflon v. Bowers, 72 Cal. 270, 13 Pac. 690; Schammel v. Schammel, 70 Cal. 72, 11 Pac. 497; Peltret v. Frank, 66 Cal. 34, 4 Pac. 885; People v. Jordan, 65 Cal. 644, 4 Pac. 683; Walsh v. Hutchings, 60 Cal. 228; Nash v. Harris, 57 Cal. 242; Pieper v. Centinela Land Co., 56 Cal. 173 (the leading case).

9. Somers v. Somers, 81 Cal. 608, 22 Pac. 967; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299.

10. Rule XXIX of the supreme court (see supra, § 326).

11. Estate of Davis, 8 Cal. App. 355, 97 Pac. 86. This erroneous decision is apparently due to a misconception of Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, where the decision rested not only on the fact that the certificate did not specify that the papers were all that were used below, but also on that fact that certification by the judge is itself insufficient.

12. People v. Terrill, 131 Cal. 112, 63 Pac. 141; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564. See, also, the cases cited infra, § 328, holding that incorporation in a bill of exceptions is the only method allowed.

13. Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564.

14. People v. Terrill, 131 Cal. 112, 63 Pac. 141.

15. Borkheim v. North British etc. Ins. Co., 38 Cal. 623 (construed in People v. Terrill, 131 Cal. 112, 63 Pac. 141).

§ 328. Bill of Exceptions.—The incorporation of the papers used at the hearing below, in a bill of exceptions has always been recognized as a proper method of authentication.[16] Indeed, after the adoption of the court rule requiring authentication to be by bill of exceptions except where another mode of authentication is provided by law,[17] and before the adoption of the alternative method of preparing the record,[18] this was the only method allowed,[19] there being no other mode of authentication provided by law.[20] Even before the adoption of this rule, authentication by means of a bill of exceptions was re-

16. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 103 Pac. 320; Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; People v. Gay, 141 Cal. 41, 74 Pac. 443; San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Pereira v. City Sav. Bank, 128 Cal. 45, 60 Pac. 524; Somers v. Somers, 81 Cal. 608, 22 Pac. 967; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Walsh v. Hutchings, 60 Cal. 228; Nash v. Harris, 57 Cal. 242; Peltret v. Frank, 66 Cal. 34, 4 Pac. 885; Pinto v. Seely, 22 Cal. App. 318, 135 Pac. 43; Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801; Descalso v. Duane, 3 Cal. Unrep. 893, 33 Pac. 328. See, also, the cases cited in the next note, this section, and the cases cited to the point that authentication may be either by bill of exceptions or reporter's transcript. Infra, § 355.

17. Rule XXIX of the supreme court (see supra, § 326).

18. See supra, § 325; infra, § 355.

19. State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Hershey v. Bristol, 162 Cal. 110, 121 Pac. 371; Matter of Danford, 157 Cal. 425, 108 Pac. 322; Estate of Dean, 149 Cal. 487, 87 Pac. 13; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Esert v. Clock, 137 Cal. 533, 70 Pac. 479; San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; People v. Terrill, 131 Cal. 112, 63 Pac. 141; Ramsbottom v. Fitzgerald, 128 Cal. 75, 60 Pac. 522; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; White v. White, 88 Cal. 429, 26 Pac. 236; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Britt v. East Side Hardware Co., 25 Cal. App. 231, 143 Pac. 244; Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459; Fisher v. Western Fuse etc. Co., 12 Cal. App. 299, 107 Pac. 332 (even under special act of March 23, 1907); Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344; Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463. See, also, Somers v. Somers, 81 Cal. 608, 22 Pac. 967, and Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299, containing strong dicta to the same effect.

20. Estate of Dean, 149 Cal. 487, 87 Pac. 13; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344.

ferred to as "a safe mode,"[1] and the court questioned whether a more simple or convenient means of presenting the case could be devised.[2] In order to comply with the rule requiring authentication by a bill of exceptions, parties appealing from orders may follow the same practice as is prescribed for the preparation and settlement of bills of exception generally.[3]

§ 329. Certificate of Clerk.—The rule is well settled that certification by the clerk is an insufficient mode of authenticating the papers used in the court below,[4] either under the old or the alternative method of perfecting and presenting the record on appeal.[5] If the transcript is prepared under the old method, the papers must be incorporated in a bill of exceptions.[6] If the transcript is prepared under the alternative method, the papers may be incorporated in the reporter's transcript.[7] If either of these methods is pursued, the record is examined and authenticated by the trial judge, the person who knows

1. Descalso v. Duane, 3 Cal. Unrep. 893, 33 Pac. 328.

2. Somers v. Somers, 81 Cal. 608, 22 Pac. 967, where Works, J., sets forth a model form.

3. Smith v. Jordan, 122 Cal. 68, 54 Pac. 368; Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863. As to this practice, see supra, §§ 273–309.

4. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; People v. Gay, 141 Cal. 41, 74 Pac. 443; Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Fitzpatrick v. Fitch, 83 Cal. 490, 23 Pac. 531; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Walsh v. Hutchings, 60 Cal. 228 (the leading case); Britt v. East Side Hardware Co., 25 Cal. App. 231, 143 Pac. 244; Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548; Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969.

5. Waymire v. California Trona Co., 176 Cal. 395, 168 Pac. 563; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Espinosa v. Gould, 32 Cal. App. Dec. 152, 190 Pac. 481; Patterson v. Rutherford, 39 Cal. App. 647, 179 Pac. 704; Avello v. Sampson, 28 Cal. App. 324, 152 Pac. 313; Russell v. Chisholm, 23 Cal. App. 727, 139 Pac. 657; Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878. As to what the clerk may certify under the alternative method of appeal, see infra, § 351.

6. See supra, §§ 326, 328.

7. See infra, §§ 351, 355.

what papers were used at the hearing below.[8] Certification by the clerk is not permissible, for it is not for the clerk to determine what papers or evidence the court acted upon.[9] His functions are limited to certifying to the correctness of the copies of the papers constituting the transcript. As he is not authorized by law to certify to the fact that certain papers have been used, his certificate can have no greater force than that of a bystander who was present at the hearing.[10] At any rate, his certificate that certain papers were used is not determinative of that fact as against his subsequent statement that he signed by mistake and without knowledge of the facts.[11] It is, of course, insufficient that the affidavits are marked as filed by the clerk, or that they are referred to merely by name of the affiants in an order of the court.[12]

§ 330. Stipulation of Parties.—Although it has sometimes been held that the stipulation of the parties is a sufficient authentication,[13] at least of such matters as affidavits, minutes or orders as distinguished from oral evidence,[14] it is a general rule that the stipulation of the parties does not take the place of the authentication required by law.[15] As the reason for this latter view, it has been said that neither parties litigant nor counsel can confer original or appellate jurisdiction by stipulation or con-

8. Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548.

9. Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Walsh v. Hutchings, 60 Cal. 228; Credit Clearance Bureau v. Weary-Alford Co., 18 Cal. App. 467, 123 Pac. 548; Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878.

10. Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491.

11. Baker v. Snyder, 58 Cal. 617.

12. Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

13. Pioneer Inv. Co. v. Muncey, 33 Cal. App. 740, 166 Pac. 591; Cordano v. Ferretti, 15 Cal. App. 670, 115 Pac. 657; Fisher v. Western Fuse etc. Co., 12 Cal. App. 299, 107 Pac. 332.

14. Pioneer Inv. Co. v. Muncey, 33 Cal. App. 740, 166 Pac. 591.

15. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299; Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879; Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463.

sent.[16] Signature by the appellant's attorneys alone is obviously insufficient.[17] The law permits a stipulation of the parties as to the correctness of the transcript,[18] but this analogy is of doubtful value; first, because the certification of the transcript may be by the clerk,[19] while authentication of papers may not;[20] and second, because the code section requiring certification of the transcript expressly allows certification by the attorneys,[1] while the court rule providing the method of authentication does not.[2]

§ 331. Sufficiency of Authentication.—If papers used below are to be considered on appeal, it must not only appear that the papers submitted in the transcript were used at the hearing below, but also that they were the only ones so used.[3] Thus, it was held, under the former rule allowing certification by the judge,[4] that a certificate was insufficient which merely stated that the papers submitted had been used at the hearing below, without certifying that they were all the papers so used.[5]

Furthermore, positive identification of the papers is required. Thus certificates of judges, at a time when they were ordinarily allowed, were held insufficient if they only identified affidavits submitted by the names of the affiants.[6] Similarly, a bill of exceptions has been re-

16. Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879.

17. O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950.

18. See supra, § 323.

19. See supra, § 322.

20. See supra, § 329.

1. Code Civ. Proc., § 953 (see supra, § 321).

2. Rule XXIX of the supreme court (see supra, § 326).

3. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966 (the leading case); Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344; Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463.

4. See supra, § 327.

5. Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; Manuel v. Flynn, 5 Cal. App. 319, 90 Pac. 463.

6. Adams v. Andross, 85 Cal. 609, 24 Pac. 842; Somers v. Somers,

garded as insufficient which merely refers to various documents, stating their character, date, date of filing, and name of affiant, even if papers corresponding to this description appear elsewhere in full in the transcript.[7]

Printing, Service and Filing.

§ 332. Printing Through Clerk of Appellate Court.— Where the transcript is prepared under the original method, printing is required.[8] In complying with this requirement, however, an appellant may avail himself of the following rule of the supreme court:

"The written transcript, in civil cases, duly authenticated, together with sufficient funds to pay the expenses of printing the same, may be transmitted to the clerk of the court to which the appeal is to be taken. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be prima facie evidence that the same is correct. The said printed copy shall also be filed, and constitute the record of the cause in said court, subject to be corrected by reference to the written transcript on file."[9]

This rule is no doubt somewhat incomplete,[10] and its provisions have seldom been invoked by appellants. It is to be strictly enforced and should be obeyed as written. Consequently, it is necessary that funds to pay for the printing accompany the written transcript, and an understand-

81 Cal. 608, 22 Pac. 967. Contra, Heffion v. Bowers, 72 Cal. 270, 13 Pac. 690.

7. San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299.

8. See supra, § 318.

9. Subd. 1 of rule XII of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; and 130 Cal. xxxv, 64 Pac. vii. Originally this appeared as rule X in much the same language: 64 Cal. 635, 52 Cal. 677, 41 Cal. 695, 37 Cal. 705, 28 Cal. 686, and 26 Cal. 693.

10. Rumfelt v. Trinity River Canal etc. Co., 83 Cal. 649, 24 Pac. 276.

ing between the attorney for the appellant and the clerk of the appellate court that the attorney should attend to the printing does not dispense with a compliance with this requirement.[11] Moreover, the general understanding is that when an appellant chooses to have his transcript printed by the clerk, he must furnish it to the clerk soon enough for the latter to have it printed and served within the forty-day period allowed for filing.[12] Certainly where the time for filing is extended in order to give the appellant an opportunity to print the transcript, he may not avail himself of this rule by filing a manuscript copy with the funds for printing within the time extended.[13]

§ 333. **Service.**—A rule of the supreme court provides as follows:

"Before the printed transcript is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party appearing by different attorneys, upon the attorney of each party so appearing."[14]

In this connection the court has said that when the appellant himself has the transcript printed, there is no reason why the copies should not be served at or before the time for filing.[15]

Another rule provides:

"Written evidence of the service upon the adverse party of the printed transcript shall be filed therewith."[16]

11. Ward v. Healy, 110 Cal. 587, 42 Pac. 1071.

12. Rumfelt v. Trinity River Canal etc. Co., 83 Cal. 649, 24 Pac. 276 (where the court, however, expressly declines to consider the point).

13. Rumfelt v. Trinity River Canal etc. Co., 83 Cal. 649, 24 Pac. 276.

14. Rule XI of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii. Rule IX of the supreme court: 64 Cal. 635; 52 Cal. 677; 41 Cal. 695; 37 Cal. 705; 28 Cal. 686; 26 Cal. 693. As to the time for filing the transcript, see infra, §§ 366–380.

15. Estate of Boyd, 25 Cal. 511.

16. Subd. 2 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii; 64 Cal. 635, 52 Cal. 677, 41 Cal. 695.

Where it appears that no substantially correct copy of the transcript has been served on the respondent, the appeal may be dismissed.[17] Failure to serve the transcript punctually, however, is not ground for dismissal, if reasonable diligence has been used, but may occasion the postponement of the hearing if the respondent has not had ample time to prepare for the argument.[18]

Service when printed through clerk.—A rule of court allows an appellant to file a written transcript with funds for printing.[19] Under the original statement of this rule, which did not specify the manner of service, it was said that the appellant should direct the clerk to forward to him for service the necessary copies, as soon as printed.[20] The present rule provides that "the clerk shall . . . transmit, by mail or express, copies to the attorneys of the adverse parties, and note such service on the original."[1]

Where an appellant avails himself of this rule, it may not always be practicable to serve before filing the printed transcript, without unduly delaying the filing.[2] Indeed, it has been the uniform practice, when the written transcript has been filed within the forty-day period allowed, or any extension of such period, to require only a service of a copy of the transcript after it has been printed under the direction of the clerk. The rules do not require, in such case, service of the transcript before it is printed.[3]

§ 334. Filing Generally.—Rules of the supreme court require the appellant, within a prescribed period,[4] to file the transcript,[5] and with it written evidence of its service

17. Green v. McMann, 79 Cal. 561, 21 Pac. 964.

18. Estate of Boyd, 25 Cal. 511.

19. See supra, § 332.

20. Estate of Boyd, 25 Cal. 511.

1. Subd. 1 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii (see supra, § 332).

2. Estate of Boyd, 25 Cal. 511.

3. Lang v. Specht, 62 Cal. 145.

4. See infra, §§ 336–374.

5. Subd. 1 of rule II (see infra, § 366).

on the adverse party.[6] If the transcript is not filed within the prescribed time (and it should be noted that the running of this time may be postponed by several circumstances),[7] the appeal will be dismissed,[8] unless the default is excused.[9] Nevertheless, the jurisdiction of the appellate court is not acquired by the filing of the transcript, and its loss or destruction, after filing, therefore does not divest the jurisdiction of the court nor prevent a determination of the appeal.[10] No transcript which fails to conform to the rules of the supreme court may be filed by the clerk.[11] Placing the transcript in the hands of an express company in transit to the clerk of the appellate court is not the equivalent of filing, and the transcript cannot be considered as filed when so placed.[12]

§ 335. **Copies Required.**—The following rules of the supreme court state the requirements as to the copies of the transcript to be filed:

"The party wishing to file any printed paper shall prepare the original and twenty copies thereof. If such paper is to be filed in a district court of appeal, the original and three copies shall be filed therein, and the remaining seventeen copies shall be delivered to the clerk of the supreme court. If it be filed in the supreme court, the original must be accompanied by the twenty copies, unless it is an application to the supreme court for the hearing of a cause decided by a district court of appeal, in which case the party shall deliver to the clerk of said district court one copy for each justice of said court or the

6. Subd. 2 of rule II (see supra, § 333).

7. See infra, §§ 367, 371, 372–374.

8. See infra, § 375 et seq.

9. See infra, §§ 379–380.

10. Estate of Davis, 151 Cal. 318, 121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711.

11. Rule X of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii. Rule VIII of the supreme court: 64 Cal. 635; 52 Cal. 677; 41 Cal. 695; 37 Cal. 705; 28 Cal. 696; 26 Cal. 693.

12. Ward v. Healy, 110 Cal. 587, 42 Pac. 1071 (saying that the principle declared in Hanson v. McCue, 43 Cal. 178, does not go to such lengths).

division thereof which rendered the decision, and file the original and seventeen copies in the supreme court."[13]

"Copies of all printed papers . . . in any matter appealed must be deposited with the clerk of the court from which the appeal is taken; and the copies so deposited shall, by said clerk, be delivered to the judge who presided at the trial of the cause in the lower court."[14]

"Whenever a map or survey or photograph forms a part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall accompany the original transcript, and reference thereto shall be made in the other copies."[15]

VII. Alternative Method of Preparing Record.

In General.

§ 336. Nature and Constitutionality.—Sections 953a, 953b and 953c of the Code of Civil Procedure, added in 1907,[16] provide an alternative method of preparing the record on appeal. This method is one which the parties may take advantage of in lieu of preparing a bill of exceptions in the usual way which would include service of the original draft upon the opposing party in the action and the preparation of amendments by such opposing party and the final submission of the bill with amendments to the judge for settlement.[17] These sections provide a substitute for the bill of exceptions.[18] They do

13. Subd. 6 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix.

14. Subd. 7 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix.

15. Rule IX of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix. The same rule, omitting the words "or photograph," appears also as Rule IV in 144 Cal. xxxiv, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii. And as rule VII in 64 Cal. 635; 52 Cal. 677; 41 Cal. 695; 37 Cal. 705; 28 Cal. 686; 26 Cal. 693.

16. Stats. 1907, p. 750.

17. Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730.

18. Code Civ. Proc., § 953a; Schmitt v. White, 172 Cal. 554, 158 Pac. 216; Pierce v. Works, 171 Cal. 684, 154 Pac. 852; Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

not purport to authorize an appeal, or prescribe how it may be taken,[19] nor do they change the rules of decision which place with the trial court or jury the determination of the credibility of the witnesses, and the weight to be given to their testimony, including the selection of one of several inferences that may be drawn from the evidence, and which shall be made the basis of the judgment of the court, and the determination of what conflicting testimony is true.[20]

The constitutionality of the legislative act which added sections 953a, 953b and 953c to the Code of Civil Procedure has been upheld as against the objection that it violates the constitutional provision that "every act shall embrace but one subject, which subject shall be expressed in its title,"[1] and as against the objection that it violates due process of law in failing to provide for service of the notice filed with the clerk that the appellant intends to appeal and requiring that a transcript be made up.[2]

§ 337. Criticism by the Courts.—The alternative method of preparing the record on appeal has often been criticised by the courts.[3] It has been said to have "disadvantages in practice,"[4] and has been referred to as a "most unsatisfactory method,"[5] and as "a pitfall for the

19. Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165. And see infra, § 338.

20. United Inv. Co. v. Los Angeles etc. Ry. Co., 10 Cal. App. 175, 101 Pac. 543.

1. Estate of McPhee, 154 Cal. 385, 97 Pac. 878, referring to § 24, art. IV, Const. Cal. See STATUTES.

2. Estate of McPhee, 154 Cal. 385, 97 Pac. 878.

3. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302; Estate of Gamble, 166 Cal. 253, 135 Pac. 970; Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 Pac. 110; Sea v. Lorden, 37 Cal. App. 444, 174 Pac. 85; Cunnison v. Miller, 34 Cal. App. 267, 167 Pac. 890; Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025; San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378.

4. Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025.

5. Cunnison v. Miller, 34 Cal. App. 267, 167 Pac. 890.

unwary."[6] In place of facilitating the decision of cases on appeal, its tendency has been to produce delay,[7] and it has, according to the critics, neither saved litigants any expense nor relieved the court or the attorneys of any labor.[8] The constant lapses, on the part of the profession, from a proper observance of the rules of practice governing the prosecution of appeals under this method have, it has been said, made it a dreadful alternative indeed.[9]

The supreme court has pointed out that there should be one, and only one, method of presenting a record on appeal,[10] and the district court of appeal has expressed the hope that the legislature, having in mind the idea of simplifying procedure, will furnish to the bar and the courts one method of appeal only, or repeal the statutory rules of procedure and leave these matters for regulation by rules of court.[11] That few attorneys bearing the reputation for painstaking care in prosecuting appeals have adopted this substitute method of presenting their records encourages the hope that if the legislature does not repeal it, attorneys generally will abandon it.[12]

§ 338. Relation to Alternative Method of Appeal.— Sections 941a, 941b and 941c, providing for the alternative method of appeal, and sections 953a, 953b and 953c, providing for the alternative method of preparing a

6. Estate of Gamble, 166 Cal. 253, 135 Pac. 970; Sea v. Lorden, 37 Cal. App. 444, 174 Pac. 85.

7. San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378.

8. James, J., concurring in McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887.

9. Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 Pac. 110.

10. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302. In McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887, James, J., concurring, said: "Multiplying methods under which appeals can be taken can conduce only to confusion in the practice and produce results which in no wise aid in the administration of justice."

11. Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025.

12. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302.

record on appeal, were added to the Code of Civil Procedure at the same time.[13] It has been said that they all form part of one scheme, or rather schemes, of appeal, and are to be read together.[14] Nevertheless, these two statutes are entirely independent of each other,[15] for the sections relating to the alternative method of preparing the record do not purport to authorize an appeal, or prescribe how it may be taken.[16] If an appeal is taken under sections 941a, 941b and 941c, the appellant may follow it up by filing a printed transcript and copies thereof, as required by the rules of the supreme court, or, at his option, by filing the typewritten transcript authorized by sections 953a, 953b and 953c. Conversely, if he takes his appeal as provided in section 940 of the Code of Civil Procedure, by serving and filing a notice of appeal and undertaking on appeal, he may support such appeal either by a transcript prepared and filed under sections 953a, 953b and 953c, or by a transcript printed and filed as was customary previous to the enactment of those sections and as directed by the rules of the court.[17] In other words, the appeal having been properly taken in compliance with either the old or the alternative method, the record may be made up in any way permitted by the code.[18] In view of the fact that the alternative method of appeal is distinct from the alternative method of preparing a record on appeal, it is to be regretted that

13. Code Civ. Proc., §§ 941a, 941b and 941c were added by Stats. 1907, p. 753, and Code Civ. Proc., §§ 953a, 953b and 953c were added by Stats. 1907, p. 750.

14. Lane v. Tanner, 156 Cal. 135, 103 Pac. 846.

15. Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100.

16. Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

17. Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100.

18. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981; Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435. Opinion of the supreme court, denying rehearing of Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023; Nezik v. Cole, 29 Cal. App. Dec. 723, 184 Pac. 523.

the courts have frequently used the former term with reference to the latter proceeding.

Proceedings for Preparation.

§ 339. In General.—The proceeding for a record under section 953a of the Code of Civil Procedure is an independent proceeding, an alternative method of preparing a record, in lieu of a bill of exceptions, to which a party may resort at his option.[19] This alternative proceeding for the preparation of the record is to be distinguished from the alternative proceeding for the taking of the appeal itself.[20] None of the proceedings provided for the preparation of the record on appeal under the alternative method is jurisdictional to the appeal,[1] although the essential steps are jurisdictional in so far as the preparation of the record is concerned.[2]

The principal steps in the preparation of the record under the alternative method are stated in the following provisions of the code:

"Any person desiring to appeal . . . may . . . file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript . . . be made up and prepared. . . . Upon receiving said notice, it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial. . . . Upon the same being filed, it shall be the duty of the clerk forthwith to give the attorneys appearing in said cause notice that said transcript has been filed, and that within five days

19. Schmitt v. White, 172 Cal. 554, 158 Pac. 216.

20. See supra, § 338.

1. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800. Opinion of the supreme court, denying rehearing of Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023; Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

2. Spear v. Monroe, 181 Cal. 728, 186 Pac. 149 (time for notice to clerk).

after the receipt of said notice the same will be presented to the judge for approval. At the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial. . . . The judge shall thereupon certify to the truth and correctness of said transcript."[3]

§ 340. Notice to Clerk.—In obtaining a record by the alternative method, the appellant's first step is to

"File with the clerk of the court from whose judgment, order or decision said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared."[4]

This notice is to be carefully distinguished from the notice of appeal.[5] It must be filed within the time required by law.[6] Unless it appears that the appellant has given this notice to the clerk, there is no affirmative showing that he is entitled to a reporter's transcript of the testimony, or to a clerk's transcript of papers on file.[7] In the absence of the filing of this notice and request, no duty devolves upon the clerk to prepare, authenticate and send up the judgment-roll.[8] Nevertheless, it has been held that even if the notice does not contain a request that a transcript of the proceedings be made up and prepared by the clerk, the transcript, if prepared and approved, may be considered on appeal.[9] Consequently, where the appellant has filed in the appellate court a type-

3. Code Civ. Proc., § 953a.
4. Code Civ. Proc., § 953a.
5. See infra, § 341.
6. See infra, §§ 345–349.
7. Estate of Allen, 175 Cal. 354, 165 Pac. 1010.
8. Dyer Law & Collection Co. v. Salisbury, 17 Cal. App. 393, 119 Pac. 947.
9. Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35.

written copy of the clerk's transcript, duly certified, the court will deny respondent's motion to dismiss the appeal because of the appellant's failure to apply for a copy of the notice of appeal and of the judgment-roll.[10]

Appeals from orders.—The code, after providing for the notice to the clerk, reads as follows:

"If the judgment, order or decree appealed from be not included in the judgment-roll, the party desiring to appeal shall on the filing of said notice, specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in the said transcript in addition to the matters hereinbefore required and the same shall be included."[11]

Under this provision it has been held that a notice in the form which is sufficient where the appeal is from a judgment is insufficient where the appeal is from an order which is not a part of the judgment-roll.[12]

§ 341. Relation to Notice of Appeal.—The notice to the clerk to have the reporter's and clerk's transcript prepared must be distinguished from the notice of the appeal itself,[13] just as the proceedings under the alternative method of preparing the record on appeal are to be distinguished from the alternative method of taking an appeal,[14] for there is no connection between the notice for the preparation of the transcript and the notice of appeal.[15] Consequently, the fact that a notice for the preparation of the transcript has been filed will not save

10. Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 179 Pac. 447.

11. Code Civ. Proc., § 953a.

12. Albertsen v. Albertsen, 33 Cal. App. Dec. 93, 192 Pac. 1040, following Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879, and Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878.

13. See, generally, the cases cited in this section.

14. See supra, § 338.

15. Lang v. Lilley & Thurston Co., 161 Cal. 295, 119 Pac. 100; Chapuis v. Pesante, 41 Cal. App. 689, 183 Pac. 247; Valine v. Valine, 32 Cal. App. Dec. 740, 192 Pac. 69, where the court says: "The notice of appeal, as required by section 940, Code of Civil Procedure, the notice to the clerk, as required by section 953a, Code of Civil Procedure, and the requirements of what the court and the

the appeal where no notice of appeal has been filed, if the notice for the preparation of the transcript merely states that the party desires to appeal,[16] or intends to appeal,[17] or has appealed,[18] or will appeal,[19] and does not state that he does appeal.[20] Conversely, the fact that a notice of appeal has been filed is altogether immaterial in so far as the effect of a failure to file the required notice for the preparation of the transcript is concerned.[1] In order to avail himself of the alternative method of preparing the record, it is incumbent upon the appellant, in addition to giving the notice of appeal, to file with the clerk a request for a transcript.[2] A notice of appeal cannot be amended to include a notice to the clerk requiring the preparation of the transcript of the testimony.[3]

§ 342. Preparation of Reporter's Transcript.—Upon receiving notice from the appellant, requesting a transcript, the code provides that

"It shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and com-

stenographic reporter shall thereafter do, are three separate and distinct matters."

16. Michelson v. City of Sacramento, 173 Cal. 108, 159 Pac. 431; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291 (pointing out that In re Nutts' Estate, 180 Cal. 419, 181 Pac. 661, is possibly inconsistent with this rule); Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

17. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Lent v. California Fruit Growers' Assn., 161 Cal. 719, 121 Pac. 1002 (as stated in Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291); Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

18. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291.

19. Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291.

20. Estate of Faber, 168 Cal. 491, 143 Pac. 737 (distinguishing cases in which the notice was not so worded and holding that a notice so worded may serve the double office of a notice of appeal and a notice for the preparation of the record); Eddy v. Hunter, 31 Cal. App. Dec. 617, 189 Pac. 291.

1. Spear v. Monroe, 181 Cal. 728, 186 Pac. 149.

2. Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878.

3. Chapuis v. Pesante, 41 Cal. App. 689, 183 Pac. 247.

pletely the phonographic report of the trial. The stenographic reporter shall within twenty days after said notice has been filed with the clerk, prepare a transcript of the phonographic report of the trial including therein copies of all writings offered or received in evidence and all other matters and things required by the notice above referred to to be contained therein, and shall file the same with the clerk of said court."[4]

While this section makes it the duty of the court to order the preparation of the record, it has been held that the omission of the court to make such order does not preclude the appellate court from considering the record, for the omission is cured by the certification by the judge.[5]

Person to prepare.—It is clear enough from the language of the section that the statement is to be prepared by the stenographer and not by the judge. The purpose is to have a literal and exact record of the proceedings. There is no provision therein for the settlement of a statement prepared by the judge from his own minutes.[6] It is of no moment, however, whether the typewriting is done by the clerk, or by the reporter. If the papers are correctly set forth in the certified transcript presented to the judge, he should certify thereto, regardless of the identity of the person who copied them.[7]

Time for preparation.—While the code provides that the stenographic reporter shall prepare and file the transcript within twenty days after notice requesting it has been filed with the clerk,[8] this provision is merely directory, and the failure of the reporter to file the tran-

4. Code Civ. Proc., § 953a.

5. White v. Hendley, 35 Cal. App. 267, 169 Pac. 710.

6. Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299.

7. Going v. Guy, 166 Cal. 279, 135 Pac. 1128, approved in Pierce v. Works, 171 Cal. 684, 154 Pac. 852.

8. Code Civ. Proc., § 953a (see supra, this section).

script within the time allowed is not jurisdictional.[9] Neither by statute nor rule of the appellate courts is there any provision prescribing a limit to the time within which the transcript is to be prepared,[10] nor any penalty for the failure of the reporter to file the transcript within twenty days.[11]

Availability of mandamus.—Mandamus will lie to compel the stenographer to prepare the transcript,[12] and if the appellant does not avail himself of it, but delays unnecessarily, his appeal will be dismissed.[13]

§ 343. Necessity for Reporter.—In several cases it has been said that the judge's certificate is properly affixed to the transcript only when there has been a stenographic reporter present at the trial and the stenographic reporter has prepared his transcript in accordance with the law.[14] If a party to an action expects to have his record on appeal prepared under the alternative method, it has therefore been said that he must see to it that the official stenographic reporter is present at the trial, in order that a transcript of the evidence and proceedings may be furnished by the one officer whose duty it is to prepare it.[15] There need never be a case where a party, by reason of the absence of the official reporter, is un-

9. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026 (where the court points out that the trial court may, in its discretion, terminate proceedings on account of the want of diligence of the appellant).

10. Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Shaw v. Blasevich, 21 Cal. App. 498, 132 Pac. 278.

11. Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026.

12. Gjurich v. Fieg, 160 Cal. 331, 116 Pac. 745; Harris v. Burt, 32 Cal. App. Dec. 240, 190 Pac. 1058.

13. Harris v. Burt, 32 Cal. App. Dec. 240, 190 Pac. 1058.

14. Bush v. Allen, 172 Cal. 102, 155 Pac. 456; Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299. To the same effect, see Koeberle v. Coit, 31 Cal. App. Dec. 825, 189 Pac. 727.

15. Bush v. Allen, 172 Cal. 102, 155 Pac. 456; Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299; Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730.

able to make up a record to be used on an appeal, for the old method, providing for the preparation and settlement of bills of exception and statements on motion for a new trial, has always been available for the purpose mentioned.[16]

Since the amendment, however, allowing the use of the alternative method of preparing the record, even where the appeal is taken on the judgment-roll alone,[17] the rule requiring a stenographic reporter has been limited in its application. It is true, of course, that as to parol evidence, and as to writings merely offered or received in evidence at a trial, as distinguished from papers, records and files in the cause, it is contemplated that there shall have been a phonographic report of the proceedings, and it may be that as to such matters there can be no record prepared under the alternative method in the absence of such a phonographic report. But if there is no such evidence to report and consequently no office for a stenographic reporter to perform, if the only matters considered on the hearing were the pleadings, papers, records and files in the cause, as is always the case on a motion heard and determined solely on affidavits and the record and files of the action, there is no possible reason why such a transcript may not consist exclusively of such papers, authenticated by the judge, in a case where the same constitute all the matters material to a proper determination of the appeal.[18]

§ 344. Payment of Reporter.—The code provides that at the time the notice requesting a transcript is filed with the clerk of the court,

"The appellant, or person intending to appeal, shall file an undertaking in an amount to be fixed by the clerk, with two good and sufficient sureties, by which the party

16. Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730.

17. See infra, § 357.

18. Pierce v. Works, 171 Cal. 684, 154 Pac. 852, per Angellotti, C. J.

giving said notice shall undertake and agree to pay the clerk the cost of preparing said transcript, or may arrange personally with the stenographic reporter for his compensation."[19]

Where the appellant fails to file the required undertaking or to make a personal arrangement with the reporter, the clerk is justified in disregarding the request to have the transcript prepared.[20] If the transcript is prepared, however, it may be considered on appeal.[1]

It is clear that the stenographic reporter cannot refuse to prepare or file the transcript because his fee has not been paid.[2] As the reason for this rule, it has been pointed out that if the reporter could refuse to file his transcription until his fee had been paid, he could deprive the appellant of his right to object to the fees charged, or, by objecting, force the appeal to await the final result of the controversy between the reporter and the appellant. Moreover, the undertaking given the clerk is security until such time as the exact amount due the reporter can be known, and this cannot be known until the final approval of the transcript by the judge. Thereupon and thereafter the appellant becomes liable for the just fees of the reporter so determined, and upon his failure to pay them recourse may be had against him and the sureties on his undertaking filed with the clerk.[3]

Time for Notice.

§ 345. In General.—It is essential that a party seeking to obtain a record on appeal by the alternative method

19. Code Civ. Proc., § 953b.

20. Harpold v. Slocum, 168 Cal. 364, 143 Pac. 609 (where the court states the rule only as to failure to file the required undertaking, the code provision for personal arrangement not having been adopted until 1915).

1. Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35.

2. Gjurich v. Fieg, 160 Cal. 331, 116 Pac. 745; Harris v. Burt, 32 Cal. App. Dec. 240, 190 Pac. 1058.

3. Gjurich v. Fieg, 160 Cal. 331, 116 Pac. 745, per Henshaw, J.

should inaugurate proceedings therefor within the time designated in the law.[4] If the required notice to the clerk is not filed within the time set by law, the appellant loses his right to prepare his record on appeal by this method,[5] and the record, if so prepared, cannot be considered by the appellate court.[6] The limitation of time declared by the code is mandatory, not directory, and a contrary construction finds no support in the decisions of the supreme court and is in no wise justified by the scheme embodied in the alternative method of appeal.[7] The failure to file a notice requesting the preparation of the record within the time specified goes to the jurisdiction in so far as the preparation of the record is concerned.[8] It is not jurisdictional, however, so far as the appeal itself is concerned,[9] and consequently the appeal cannot be dismissed because the required notice was filed too late.[10] Where the respondent objects to the consideration of the transcript on the ground that the required notice was not given in time, he must present his objection to the appellate court upon a bill of exceptions.[11]

§ 346. Period Prescribed.—Prior to August 8, 1915, a proceeding for a record by the alternative method was required to be initiated by the filing of the notice with the clerk "within ten days after notice of entry of the

4. Schmitt v. White, 172 Cal. 554, 158 Pac. 216.

5. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429; Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611; Estate of Keating, 158 Cal. 109, 110 Pac. 109; Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13.

6. Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13; McDowell v. Title Guarantee & Trust Co., 32 Cal. App. Dec. 735, 192 Pac. 103; Valine v. Valine, 32 Cal. App. Dec. 740, 192 Pac. 69.

7. Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13; Valine v. Valine, 32 Cal. App. Dec. 740, 192 Pac. 69.

8. Spear v. Monroe, 181 Cal. 728, 186 Pac. 149.

9. Opinion of supreme court denying hearing of Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026; Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

10. Garner v. Meizel, 22 Cal. App. 256, 133 Pac. 1165.

11. Hecker v. Baker, 19 Cal. App. 667, 127 Pac. 654.

judgment, order or decree" appealed or to be appealed from.[12] On that date, an amendment adopted at the legislative session of 1915 went into effect, and a provision was added that "if a proceeding on motion for a new trial be pending," such notice might be filed "within ten days after notice of decision denying said motion, and other determination thereof."[13] It has been said that the purpose of this amendment was to afford to the appellant an opportunity to obtain a review of an order denying a new trial on appeal from the judgment, and that the new provision should therefore be liberally construed for the purpose of enabling such a review where the proceeding was pending at the time the change in the law took effect. It was not its purpose, however, to give a party who had appealed from a judgment prior to the change in the law, and whose right to such a record had absolutely expired prior to such date, a right to a new record for the purpose of reviewing matters in no way germane to the question of the correctness of the disposition of the motion for new trial, and material only to questions involved in the appeal from the judgment as the law stood prior to the change. To construe the law otherwise would be to give it a retroactive effect not warranted by any rule of construction, for it is uniformly held that a change in the law extending the time in which a proceeding may be commenced will not be considered as operating to create a new right where the time under the old law had already expired.[14]

12. Schmitt v. White, 172 Cal. 554, 158 Pac. 216; Title Ins. & Trust Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611; Estate of Keating, 158 Cal. 109, 110 Pac. 109; Hartfield v. Alderete, 25 Cal. App. 732, 145 Pac. 146; Shaw v. Blasevich, 21 Cal. App. 498, 132 Pac. 278; Watson v. Dingley, 14 Cal. App. 88, 111 Pac. 106.

13. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429; Schmitt v. White, 172 Cal. 554, 158 Pac. 216 (directing attention to the change); Stoner v. Security Trust Co., 32 Cal. App. Dec. 30, 190 Pac. 500.

14. Schmitt v. White, 172 Cal. 554, 158 Pac. 216, per Angellotti, C. J.

§ 347. Commencement of Period.—The Code of Civil Procedure provides that the notice to the clerk

"must be filed within ten days after notice of the entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof."[15]

Pursuant to the first part of this provision, the court has held that it must be shown, before the appellant can be deprived of his right to prepare his appeal under the alternative method that he had notice of the entry of judgment.[16] Whether or not the notice of the entry of judgment was in fact given is a question of fact to be determined by the judge to whom the transcript is presented for certification.[17] The date of an acknowledgment of service is not conclusive as to the time when notice of the entry of judgment was served if the attorney files affidavits showing that the date was erroneous.[18]

Pursuant to the second part of the code provision set forth at the beginning of this section, it has been said that the ten days' time "after notice of decision" denying a motion for new trial or "other termination" of such a motion, commences to run immediately upon the failure of the trial court to pass on the motion within three months after the verdict of the jury or service on the moving party of notice of decision of the court.[19] Nevertheless, it has been held that if the respondent has not given notice of the termination of a motion for new trial by reason of the passage of time following service of the entry of judgment, he cannot object to the appellant's delay in filing his notice requiring the preparation of the record.[20]

15. Code Civ. Proc., § 953a.

16. Shaw v. Blasevich, 21 Cal. App. 498, 132 Pac. 278.

17. Hecker v. Baker, 19 Cal. App. 667, 127 Pac. 654.

18. Andrews v. Robertson, 177 Cal. 434, 170 Pac. 1129.

19. Bernschein v. Whitaker, 175 Cal. 130, 165 Pac. 523.

20. Stoner v. Security Trust Co., 32 Cal. App. Dec. 30, 190 Pac. 500.

§ 348. Sufficiency of Notice of Judgment.—Written notice of the entry of the judgment, order or decree is not required in order to start the running of the ten-day period prescribed for filing notice with the clerk requesting the preparation of the transcript.[1] Actual notice, established by satisfactory evidence of record, is sufficient.[2] This actual notice must be shown by facts appearing in the records, files or minutes of the court, such, for instance, as the filing by the party of a notice of appeal, or a notice of intention to move for a new trial, or an application for a stay of execution.[3] Filing of a notice of appeal from a judgment or order is conclusive evidence that the appellant knew of the judgment or order and its contents at the time of filing the notice, and therefore fixes the beginning of the time to give notice to the clerk in the absence of anything to show that he had notice thereof theretofore.[4] Furthermore, it is fair to presume that an appellant had notice of the entry of judgment at

1. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429; Bernschein v. Whitaker, 175 Cal. 130, 165 Pac. 523; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611; Estate of Keating, 158 Cal. 109, 110 Pac. 109 (citing Barron v. Deleval, 58 Cal. 95, and other cases applying the same rule to the running of the time to amend or answer a pleading after a demurrer thereto has been sustained); McDowell v. Title Guarantee & Trust Co., 32 Cal. App. Dec. 735, 192 Pac. 103; French v. Macnider, 28 Cal. App. 67, 151 Pac. 371. A contrary statement, made in Hartfield v. Alderete, 25 Cal. App. 732, 145 Pac. 146, was corrected in Hartfield v. Alderete, 26 Cal. App. 604, 147 Pac. 991. This rule does not apply, however, to Code Civ. Proc., § 941b, prescribing the time for taking an appeal after the entry of judgment. Magee v. Magee, 174 Cal. 276, 162 Pac. 1023; Estate of Keating, 158 Cal. 109, 110 Pac. 109; French v. Macnider, 28 Cal. App. 67, 151 Pac. 371.

2. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429; Estate of Keating, 158 Cal. 109, 110 Pac. 109; Bernschein v. Whitaker, 175 Cal. 130, 165 Pac. 523; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611; McDowell v. Title Guarantee & Trust Co., 32 Cal. App. Dec. 735, 192 Pac. 103; Hartfield v. Alderete, 26 Cal. App. 604, 147 Pac. 991.

3. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429.

4. Title Ins. & Trust Co. v. California Dev. Co., 168 Cal. 397, 143 Pac. 723; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611 (stating the rule as given in the text); Estate of Keating, 158 Cal. 109, 110 Pac. 109; French v. Macnider, 28 Cal. App. 67, 151 Pac. 371.

the time when he filed a written demand that a transcript of the phonographic report be made up and prepared.[5] On the other hand, a minute entry showing that a motion for new trial was denied, does not prove that the parties had notice of the original decision.[6]

§ 349. Relief from Default.—The code provides that

"The court . . . may . . . upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."[7]

It has often been held that this provision is applicable to a default in failing to present a bill of exceptions within the time required,[8] and the supreme court has recently held it applicable to a default in failing to file the notice requesting a transcript under the alternative method within the required period of ten days.[9] It has been held, however, in connection with the rule that written notice of the entry of the judgment, order or decree is not required to start the running of this period,[10] that the fact that the attorney for the appellant misread the code requirements, and thought that written notice of the order appealed from was required to start running the time for filing his notice with the clerk, is a mistake too palpable to serve as a ground for relief.[11] Moreover, it has been held that an ex parte order, granting further time for the preparation of the record does not relieve a party from his default in failing to file the required notice asking for a transcript;[12] and, still more directly, that an

5. Shaw v. Blasevich, 21 Cal. App. 498, 132 Pac. 278.

6. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429.

7. Code Civ. Proc., § 473.

8. See supra, § 293 et seq.

9. Revert v. Hesse, 60 Cal. Dec. 557, 193 Pac. 943. See, also, suggestions that this provision is applicable in Lapique v. Superior Court, 40 Cal. App. 582, 181 Pac. 227, and generally in the cases cited in this section.

10. See supra, § 348.

11. Estate of Keating, 158 Cal. 109, 110 Pac. 109.

12. Spear v. Monroe, 181 Cal. 728, 186 Pac. 149.

ex parte order extending the time for notice to the clerk is invalid.[13] Manifestly the application for relief must be made within six months after the default.[14] Application for relief should ordinarily be made in the trial court, and not in the appellate court.[15] Nevertheless, where default in filing notice within the required time is made under circumstances showing a good cause for relief under the decisions applying the section of the code set forth above, the supreme court will grant similar relief, whether that section be applicable to the supreme court or not.[16] The fact that notice to the clerk to prepare the transcript was not filed in the time prescribed is not ground for dismissal if relief has been obtained from the trial court.[17]

Certification of Record.

§ 350. Signature of Judge.—To authenticate the matters presented solely by the reporter's transcript, as distinguished from such matters, as the judgment-roll and notice of appeal,[18] the signature of the judge is essential.[19] There is no provision for certificate by the shorthand re-

13. Valine v. Valine, 32 Cal. App. Dec. 740, 192 Pac. 69.

14. McDowell v. Title Guarantee & Trust Co., 32 Cal. App. Dec. 735, 192 Pac. 103. As to the application of the same rule in the case of bills of exception, see supra, § 295.

15. Revert v. Hesse, 60 Cal. Dec. 557, 193 Pac. 943 (citing earlier California cases); Espinosa v. Gould, 32 Cal. App. Dec. 152, 190 Pac. 481.

16. Estate of Keating, 158 Cal. 109, 110 Pac. 109.

17. Revert v. Hesse, 60 Cal. Dec. 557, 193 Pac. 943.

18. See infra, § 351.

19. Richmond v. Julian Consol. Min. Co., 176 Cal. 600, 169 Pac. 356; Bush v. Allen, 172 Cal. 102, 155 Pac. 456; Williams v. Lane, 158 Cal. 39, 109 Pac. 873; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Tracy Brick & Art Co. v. Wurster, 30 Cal. App. Dec. 770, 187 Pac. 125; Barnebee v. Hunstock, 29 Cal. App. Dec. 551, 183 Pac. 951; People v. Bunnell, 38 Cal. App. 548, 177 Pac. 173; People v. Bunnell, 38 Cal. App. 548, 177 Pac. 173; Avello v. Sampson, 28 Cal. App. 324, 152 Pac. 313; Carignani v. Tortolani, 28 Cal. App. 44, 151 Pac. 172; Lewis v. Lapique, 26 Cal. App. 448, 147 Pac. 221; Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879; Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548.

porter,[20] and the certification of the clerk,[1] or the stipulation of the parties,[2] is insufficient. It may be observed, however, that the absence of a proper authentication by the trial judge precludes only the consideration of the particular papers not authenticated, and does not forbid an examination of the record that is properly before the appellate court.[3] Where the typewritten transcript contains no certificate of the judge who presided at the trial to the truth and correctness of such transcript as containing the matters required by the code, but in lieu thereof contains a certificate to the effect that certain notices, stipulation and affidavits set forth in said transcript "are correct and were before me and considered by me in connection with other testimony" upon the various rulings of which appellant complains, it has been held that this certificate is manifestly insufficient.[4] When the judge before whom an action was tried is dead, or has been removed from office, or resigns, the reporter's transcript may be settled and certified by his successor in office; or if he be disqualified, or if the original judge becomes disqualified, or is absent from the state, by a judge of the same or an adjoining county.[5]

§ 351. Signature of Clerk.—What the judge is required to correct, approve and certify under the new practice in lieu of a bill of exceptions is the stenographic notes of the trial, containing the proceedings and evidence which would form no part of the record unless authenticated as

20. Williams v. Lane, 158 Cal. 39, 109 Pac. 873; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846.

1. Tracy Brick & Art Co. v. Wurster, 30 Cal. App. Dec. 770, 187 Pac. 125; Barnebee v. Hunstock, 29 Cal. App. Dec. 551, 183 Pac. 951; Avello v. Sampson, 28 Cal. App. 324, 152 Pac. 313; Carignani v. Tortolani, 28 Cal. App. 44, 151 Pac. 172; Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879; Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878.

2. Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879.

3. Waymire v. California Trona Co., 176 Cal. 395, 168 Pac. 563.

4. Nadeau v. Lynch, 41 Cal. App. 755, 183 Pac. 278.

5. Rule XXVII of the supreme court: 177 Cal. xliii, 176 Pac. vii.

the statute provides, and not the transcript on appeal which the clerk may certify, containing only the pleadings and orders constituting the judgment-roll.[6] The clerk's certification is all that is required for the notice of appeal and the judgment-roll.[7] It is insufficient, however, for affidavits used on a motion,[8] for the papers and pleadings leading to an order subsequent to the judgment,[9] or for instructions to the jury given or requested.[10] Thus, it is the duty of the judge, where the appeal is from a proceeding in which there is no judgment-roll, to certify the papers which are analogous to those which would constitute a judgment-roll.[11] In harmony with the foregoing principles, it has been held that if the transcript is signed only by the clerk, the appellate court may only consider the matters ordinarily embraced within the judgment-roll.[12]

6. Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997; Christenson Lumber Co. v. Seawell, 157 Cal. 405, 108 Pac. 276 (stating the rule as given in the text); Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878.

7. Richmond v. Julian Consol. Min. Co., 176 Cal. 600, 169 Pac. 356; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686.

8. Waymire v. California Trona Co., 176 Cal. 395, 168 Pac. 563; Espinosa v. Gould, 32 Cal. App. Dec. 152, 190 Pac. 481.

9. Barnebee v. Hunstock, 29 Cal. App. Dec. 551, 183 Pac. 951 (where the court distinguishes language used in Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686, as used with reference to an appeal taken upon the judgment-roll alone).

10. Tracy Brick & Art Co. v. Wurster, 30 Cal. App. Dec. 770, 187 Pac. 125 (holding that a typewritten note at the end of each instruction, "Given, Sloane, Judge," or "Refused Sloane, Judge," is insufficient).

11. Going v. Guy, 166 Cal. 279, 135 Pac. 1128.

12. Richmond v. Julian Consol. Min. Co., 176 Cal. 600, 169 Pac. 356; Bush v. Allen, 172 Cal. 102, 155 Pac. 456; Estate of Gamble, 166 Cal. 253, 135 Pac. 970; Kibbe v. Graves, 32 Cal. App. Dec. 326, 191 Pac. 81; People v. Bunnell, 38 Cal. App. 548, 177 Pac. 173.

§ 352. Proceedings for Judge's Signature Generally.—The code provides that upon the transcript being filed with the clerk by the reporter,

"It shall be the duty of the clerk forthwith to give the attorneys appearing in said cause notice that said transcript has been filed, and that within five days after the receipt of said notice the same shall be presented to the judge for approval. At the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate. The judge shall thereupon certify to the truth and correctness of said transcript and the same shall, when settled and allowed, be and become a portion of the judgment-roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law."[13]

Where the judge who presided at the trial is not within the county when the notice required by law is given to the attorneys informing them that the transcript is ready for presentation, the judge may appoint a day for presentation and the hearing may be continued until that time.[14] Where the court has certified the reporter's transcript, its duty and authority in this regard are exhausted. Unless the appellant applies for relief from such a settlement, he is therefore not entitled to require the settlement of an additional transcript.[15]

Availability of mandamus.—Mandamus is available to require the judge below to certify to the correctness of the reporter's transcript,[16] just as it is available to require

13. Code Civ. Proc., § 953a.

14. Story v. Green, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870. If the original judge is absent from the state, it may be certified by a judge of the same or an adjoining county. Rule XXVII of the supreme court: 177 Cal. xliii, 176 Pac. vii.

15. Lapique v. Superior Court, 40 Cal. App. 582, 181 Pac. 227.

16. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429; Pierce v. Works, 171 Cal. 684, 154 Pac. 852;

him to settle a proposed bill of exceptions.[17] But where the record which it is sought to require the judge to certify is not, under the circumstances, such a record as the judge is required to certify, the application for a writ of mandate will be denied.[18] Consequently, the writ will be denied if the notice to the clerk was filed too late,[19] if the transcript was not prepared by the shorthand reporter,[20] or if it contains only matter which the clerk may certify.[1]

§ 353. Notice of Presentation—Amendments and Supplements.—For the protection of the respondent, the code provides for notice of presentation to the attorneys appearing in the cause.[2] It has been pointed out that this notice is one by the clerk of the court, and not by the parties. Consequently, it has been held that the sections of the code requiring notice to a party to be given by personal service where the attorneys have their offices in the same city do not apply. There is no provision requiring notice by the clerk to be given by personal service, and such requirement of a public official would be burdensome in a degree out of all proportion to any advantage and should not be exacted. It is enough for the clerk to give notice by mail. As to the time of notice, the requirement of the statute is simply that the time specified be within five days of the giving of the notice. If the time allowed be too short for a sufficient examination of the transcript, a request should be made to the court for further time.[3]

Going v. Guy, 166 Cal. 279, 135 Pac. 1128.

17. See supra, §§ 296–301.

18. Schmitt v. White, 172 Cal. 554, 158 Pac. 216.

19. Spear v. Monroe, 181 Cal. 728, 186 Pac. 149; Schmitt v. White, 172 Cal. 554, 158 Pac. 216; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611.

20. Bush v. Allen, 172 Cal. 102, 155 Pac. 456; Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730.

1. Christenson Lumber Co. v. Seawell, 157 Cal. 405, 108 Pac. 276.

2. Code Civ. Proc., § 953a (see supra, § 352).

3. Lawrence v. Premier Indemnity Assur. Co., 180 Cal. 688, 182 Pac. 431.

Where the official reporter prepares the transcript under the alternative method, there is no provision for amendments to be offered by the opposing party,[4] as in the case of bills of exception.[5] This difference is no doubt due to the fact that the transcript is prepared by the reporter, an officer of the court whose business it is, when so required, to make a record of all the evidence and proceedings.[6] The code provides, however, that

"The respondents on said appeal may at the time said transcript is presented for settlement and allowance, require the insertion therein of such other papers, files, documents, records and proceedings of said cause as they then desire to have incorporated therein, and the said papers, files, documents, records and proceedings shall when so incorporated be deemed fully authentic for use on said appeal. The parties may by stipulation omit any matters from said record which they desire to so omit."[7]

Contents and Form of Record.

§ 354. Matters to be Included Generally.—Section 953a of the Code of Civil Procedure, relating to the reporter's transcript, purports to provide a method for the preparation of a record to which a party appealing "from any judgment, order or decree of the superior court" may resort "in lieu of preparing and settling a bill of exceptions," and under which, of course, he may bring to the appellate court anything he might properly include in a bill of exceptions.[8] In asking for the transcript, the appellant may request that it contain

"The testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements

4. Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730 (pointing out also that there is no provision for the service of a copy upon the adverse party).

5. See supra, § 275.

6. Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730.

7. Code Civ. Proc., § 953a.

8. Pierce v. Works, 171 Cal. 684, 154 Pac. 852.

of the court, also all objections or exceptions of counsel, and all matters to which the same relate."

In preparing the transcript, the reporter shall include therein

"Copies of all writings offered or received in evidence and all other matters and things required by the notice above referred to to be therein contained."[9]

In cases as to which there is no provision of the code requiring the making of a judgment-roll, the appellant may include in his notice to the clerk a request that the documents relating to the order appealed from and corresponding to the judgment-roll be included in the transcript to be made up and prepared by the reporter.[10] Where the appeal is from a judgment by default, the appellant is not entitled to have the testimony incorporated in the transcript.[11]

§ 355. Inclusion of Papers Used Below.—Rule XXIX of the supreme court reads as follows:

"In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."[12]

After the adoption of this rule, and until the introduction of the alternative method of preparing the record, no other mode of authentication was provided by law except by bill of exceptions.[13] Since that time, however, it seems that papers and evidence used on the hearing of the motion below may be authenticated either by including

9. Code Civ. Proc., § 953a.

10. Going v. Guy, 166 Cal. 279, 135 Pac. 1128. See supra, § 340; infra, § 355.

11. Crackel v. Crackel, 17 Cal. App. 600, 121 Pac. 295.

12. Rules of the supreme court: (1919) 177 Cal. xliii, 176 Pac. vii; (1912) 160 Cal. xli, 119 Pac. ix; (1905) 144 Cal. xxxix, 78 Pac. vii; (1892) 130 Cal. xxxv, 64 Pac. vii. For general discussion of this rule, see supra, § 325 et seq.

13. See supra, §§ 326, 328.

them in a bill of exceptions or in the papers prepared under the alternative method.[14]

Where the order appealed from is not included in a judgment-roll, the parties may have inserted in the transcript any of the pleadings, papers, records, and files in the cause.[15] Thus it has been said that upon appeal from an order heard and determined, at least in part, upon affidavits, the transcript of the reporter's notes should consist of copies of the affidavits, the rulings of the court, and any other evidence taken at the hearing,[16] The inclusion of the affidavits is essential, for the law requires that they be authenticated by the judge, rather than by the clerk.[17]

14. Hertel v. Emireck, 178 Cal. 534, 174 Pac. 30; State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526; Patterson v. Rutherford, 39 Cal. App. 647, 179 Pac. 704; Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299; Columbia Crude Oil Co. v. Deyo, 25 Cal. App. 268, 143 Pac. 243; Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879; Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878; Patterson v. Rutherford, 39 Cal. App. 647, 179 Pac. 704; Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467, 123 Pac. 548; Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564. See, however, Britt v. East Side Hardware Co., 25 Cal. App. 231, 143 Pac. 244, a case decided in 1914, where the court says that "the only proper mode for authenticating a record on an appealable order is by a bill of exceptions."

15. Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997. "If the judgment, order or decree appealed from be not included in a judgment-roll, the party desiring to appeal shall on the filing of said notice specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required and the same shall be included." Code Civ. Proc., § 953a. This is a different request from that required when there is a judgment-roll. Albertsen v. Albertsen, 33 Cal. App. Dec. 93, 192 Pac. 1040; and see supra, § 340.

16. Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526.

17. Waymire v. California Trona Co., 176 Cal. 395, 168 Pac. 563. It is no part of the duty of the clerk to give such a certificate, and he cannot be compelled by mandamus to do so. Rose v. Lelande, 17 Cal. App. 308, 119 Pac. 532.

§ 356. Form and Arrangement Generally.—A rule of the supreme court reads in part as follows:

"Transcripts on appeal in civil cases, prepared under section 953a of the Code of Civil Procedure . . . must be typewritten and the paper and the backs for binding the same must not exceed ten inches in length and eight inches in width. The leaves must be bound together on the left-hand side in volumes of convenient size. . . . The papers required to be sent by the clerk . . . in civil cases under said section 953a, . . . constituting the ordinary judgment-roll, are here designated as the 'Clerk's Transcript,' and the certified transcriptions of the phonographic reporter's notes required by . . . section 953a in civil cases are here designated as the 'Reporter's Transcript.' The respective papers in the Clerk's Transcript must be placed in chronological order, and if it is bound with the Reporter's Transcript, it must come first in order. The pages of the Clerk's Transcript and those of the Reporter's Transcript must be numbered separately by consecutive numbers. The lines of each page must be numbered separately and consecutively. An index of each transcript must be inserted at the beginning thereof, referring to each document and to the page beginning the examination, cross-examination, redirect, and recall of each witness."[18]

The purpose of this rule is not only to secure records of a uniform size for the filing cases in the clerk's office, but the presentation of transcripts in orderly and convenient form, properly paged and indexed, for examination by the court in determining the questions involved in the appeal. Of course, it is not sufficient that the transcript presented comply with the rule in form and size only.[19] Nevertheless, if the transcript is upon paper

18. Subd. 2, rule VII of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xliii, 119 Pac. xi; O'Dea v. Roberts, 33 Cal. App. 345, 164 Pac. 1135. In connection with this rule, it has been observed that the rules laid down by the supreme court for the government of the appellate practice are as much a part of the California system of procedure as the rules promulgated for that purpose by the legislature. Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. As to rules of court generally, see COURTS.

19. O'Dea v. Roberts, 33 Cal. App. 345, 164 Pac. 1135. In Naylor

within the maximum size allowed by the rule, and if the contested points are few and simple, failure to arrange the pleadings, proceedings and transcript in chronological order may cause no such inconvenience as would warrant the dismissal of the appeal.[20]

§ 357. Printing of Record.—Where the appellant prepares his record under the alternative method, printed copies are not required,[1] and a typewritten copy is sufficient.[2] The code provides that where the record on appeal is prepared under the alternative method, "such record shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed,"[3] and a rule of the supreme court provides that transcripts so prepared "must be typewritten."[4] It has been observed, however, that the language of the code provision just quoted is permissive, and that it is desirable that a printed and duly authenticated copy of the transcript be filed in the appellate court in lieu of the original transcript of the reporter's notes.[5] Moreover, the parts of the typewritten transcript which the appellate court is to consider should be printed in the briefs.[6]

Printing of judgment-roll.—In cases where a reporter's transcript is prepared, the whole record on appeal, including the judgment-roll, may be typewritten. This is

v. Adams, 15 Cal. App. 548, 115 Pac. 335, the court in fact considered a transcript improperly arranged, but declared its action was not to be accepted as a precedent.

20. Story v. Green, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870.

1. Semi-Tropic Spiritualists' Assn. v. Johnson, 163 Cal. 639, 126 Pac. 488. And see generally the cases cited infra, §§ 359–365.

2. Miller v. Oliver, 174 Cal. 404, 163 Pac. 357. Opinion of the supreme court denying hearing of McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887.

3. Code Civ. Proc., § 953c; Seymour v. Oelrichs, 162 Cal. 318, 122 Pac. 847.

4. Rule VII of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix. Opinion of the supreme court denying hearing of McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887.

5. Seymour v. Oelrichs, 162 Cal. 318, 122 Pac. 847.

6. See infra, § 359 et seq.

the practice since the amendment of 1915.[7] In cases where no reporter's transcript is prepared, that is, where the appeal is taken on the judgment-roll, the alternative method of preparing a record on appeal did not apply until 1915, and there was therefore no statutory exemption from the necessity of printing the transcript.[8] In 1915 a code amendment was adopted, providing that the alternative method of preparing the record should be available not only as a substitute for a bill of exceptions, but also "for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment."[9] The effect of this amendment is to authorize a record under the new method even where the appeal is on the judgment-roll alone, and consequently to authorize the use of a typewritten copy thereof.[10]

§ 358. Use of Copies.—A rule of the supreme court, after providing that parties filing printed copies of papers in the appellate court shall file an original and twenty copies thereof, and that parties filing typewritten copies shall file the original, which must not be a carbon copy, and three copies thereof, provides as follows:

"In civil cases appealed under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, . . . the record upon appeal shall be prepared and trans-

7. Opinion of the supreme court denying hearing of McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887.

8. Harpold v. Slocum, 168 Cal. 364, 143 Pac. 609 (the leading case). Opinion of the supreme court denying hearing of McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887; Lapique v. Plummer, 33 Cal. App. 317, 165 Pac. 56.

9. Code Civ. Proc., § 953a, as amended by Stats. 1915, p. 206.

10. Opinion of the supreme court denying hearing of Emmett v. Coons, 34 Cal. App. 197, 167 Pac. 888, 890. Opinion of the supreme court denying hearing of McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887 (directing attention to the change, and refusing sanction to the opinion of the district court of appeal following the former rule); Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 179 Pac. 447; Beckett v. Stuart, 35 Cal. App. 796, 171 Pac. 107.

mitted to the court to which the appeal is taken, in accordance with said sections; and no further copies of such record shall be required."[11]

With reference to the judgment-roll and the notice of appeal, the main effect of the alternative method of preparing a record seems to be to permit the use of typewritten, instead of printed, copies.[12] The originals of papers of this class should remain on file in the office of the clerk of the superior court, and not be sent up to the reviewing court.[13] While the statute is open to the construction that the original of the transcript may be sent up to the appellate court, it was clearly not intended to authorize the clerk of the trial court to send up his original files in the action, consisting of the pleadings, findings, judgment and other papers made a part of the judgment-roll. To do this would not only deprive the office of the papers and records which the law makes it the duty of the clerk of the superior court to preserve, but would render him unable to enter up the remittitur of the appellate court.[14]

With reference to the transcript of testimony, etc., prepared in lieu of a bill of exceptions, other considerations apply. The statute evidently contemplates that the original, rather than a copy, of such transcript, shall be transmitted to the court in which the appeal is to be heard.[15] It may be observed, however, that the original transcript of the reporter's notes as approved by the judge need not be sent up, for a printed and certified copy will be noticed by the appellate court.[16]

11. Subd. 6, rule II, of the supreme court: 177 Cal. xliii, 176 Pac. vii.

12. Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997. See supra, § 357.

13. Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997; Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940.

14. Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940.

15. Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997.

16. Seymour v. Oelrichs, 162 Cal. 318, 122 Pac. 847.

Printing Portions of Record in Brief.

§ 359. **In General.**—The Code of Civil Procedure, after providing that where the record is prepared under the alternative method, "no transcript thereof need be printed,"[17] declares as follows:

"In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."[18]

The purpose of this statute is not only for the benefit of the appellate court, but also for the benefit of the respondent. The typewritten transcript under the alternative method is filed in the appellate court, and it is a very reasonable requirement that the respondent when served with the appellant's brief should have before him as a part of that brief a showing of the precise matters in printed form to which he is called upon to reply.[19] Under this statute it is the duty of the appellant to print in his opening brief such portion of the record as he desires to call to the attention of the appellate court, and it is not proper procedure to omit to do so and discuss the evidence in the reply brief.[20] If the appellant fails to present a record which would justify a reversal of the judgment or order appealed from, respondent is not called upon to supplement it by additions thereto, but may stand upon the record so presented.[1] Accordingly, if the appellant prints in his brief portions of the transcript and the respondent files no brief and raises no question as to the correctness or sufficiency of the record as presented by the appellant, the appellate court will accept the portion set

17. See supra, § 357.

18. Code Civ. Proc., § 953c. This requirement was not changed by the amendment of 1919 providing that an appeal shall not be dismissed or decided adversely due to failure to print the required matter in the brief. See infra, § 362.

19. Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025.

20. Wong Ah Sure v. Ty Fook, 37 Cal. App. 465, 174 Pac. 64.

1. McLaren v. Hards, 39 Cal. App. 104, 178 Pac. 332.

out in the appellant's brief as correct and true.[2] The appellant is not only required to print the material portions of the record in his brief, but is required in such cases to index his brief in the same manner as a printed transcript.[3]

§ 360. Examination of Typewritten Transcript.—In harmony with the statutory rule that parties who have prepared their record under the alternative method must print in their briefs, or in supplements thereto, such portions of the record as they desire to call to the attention of the court,[4] is the judicial rule, affirmed by the cases, again and again, that the appellate court is not required to look at the typewritten transcript for matters which are not set forth in the briefs or in supplements thereto.[5]

2. Beckett v. Stuart, 23 Cal. App. 373, 138 Pac. 115.

3. Rule VIII of the supreme court, as amended 1921.

4. See supra, § 359.

5. Hawley v. State Assur. Co., 59 Cal. Dec. 119, 187 Pac. 1; Silverstin v. Kohler & Chase, 181 Cal. 51, 9 A. L. R. 1177, 183 Pac. 451; Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 Pac. 158; Chandlee v. McCalla, 179 Cal. 678, 178 Pac. 709; Scott v. Hollywood Park Co., 176 Cal. 680, 169 Pac. 379; Miller v. Oliver, 174 Cal. 404, 163 Pac. 357; Pearson v. Parsons, 173 Cal. 336, 159 Pac. 1173; Town of St. Helena v. Merriam, 171 Cal. 135, 152 Pac. 299; Thompson v. Hamilton Motor Co., 170 Cal. 737, Ann. Cas. 1917A, 677, 151 Pac. 122; O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Avery v. Hagenios, 30 Cal. App. Dec. 985, 187 Pac. 119; Schaefer v. Dinwiddie, 30 Cal. App. Dec. 627, 186 Pac. 617; Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024; Dupes v. Dupes, 29 Cal. App. Dec. 685, 184 Pac. 425; Schaad v. Barceloux, 29 Cal. App. Dec. 354, 183 Pac. 716; Arthur v. Fetterman, 29 Cal. App. Dec. 128, 183 Pac. 307; Walberg v. Underwood, 41 Cal. App. 679, 183 Pac. 254; Tobey v. Randall, 41 Cal. App. 292, 182 Pac. 771; City Street Improvement Co. v. Silvershield, 40 Cal. App. 597, 181 Pac. 393; Varney Bros. & Co. v. Abbott, 39 Cal. App. 721, 179 Pac. 894; McLaren v. Hards, 39 Cal. App. 104, 178 Pac. 332; Dutwiler v. Klunk, 37 Cal. App. 796, 174 Pac. 919; Pitt v. Pensinger, 37 Cal. App. 199, 173 Pac. 598; Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 Pac. 110; Shorr v. City of Azusa, 38 Cal. App. 709, 177 Pac. 513; Pretty v. Warden, 38 Cal. App. 706, 177 Pac. 489; Sea v. Lorden, 37 Cal. App. 444, 174 Pac. 85; Wheeler v. Houston, Gore & Loy, 37 Cal. App. 407, 174 Pac. 121;

While the alternative method of preparing the record on appeal permits parties to file typewritten transcripts in lieu of printed judgment-rolls and bills of exception,[6] it is impossible to lay down any rule as to just exactly what must be printed in the brief for review under that method.[7] The appellate court is not required to assume the vexatious burden of searching the typewritten transcript for error,[8] and the legislature did not intend that it should do so.[9] In a word, the appellant should print enough to disclose the points made, and relied on by him.[10]

Moore v. Guajardo, 37 Cal. App. 342, 174 Pac. 92; Nave v. Graham, 37 Cal. App. 332, 174 Pac. 76; Borba v. De Mello, 36 Cal. App. 601, 172 Pac. 1113; Anderson v. Wilcox, 36 Cal. App. 430, 172 Pac. 398; Barker Bros. v. Joos, 36 Cal. App. 311, 171 Pac. 1085 (citing many cases); Blochman Commercial & Sav. Bank v. Ketcham, 36 Cal. App. 284, 171 Pac. 1084; Rattray v. Wickersheim Implement Co., 36 Cal. App. 253, 171 Pac. 964; Perkins v. Edinburg, 36 Cal. App. 116, 171 Pac. 971; Hepler v. Wright, 35 Cal. App. 567, 170 Pac. 667; Huffaker v. McVey, 35 Cal. App. 302, 169 Pac. 704; Stewart v. Andrews, 35 Cal. App. 230, 169 Pac. 397; Jones v. American Potash Co., 35 Cal. App. 128, 169 Pac. 397; California Sav. & Commercial Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395; Beecham v. Burns, 34 Cal. App. 754, 168 Pac. 1058; Cunnison v. Miller, 34 Cal. App. 267, 167 Pac. 890; McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887; Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025; Mullia v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008; Robertson v. Ballou, 29 Cal. App. 711, 157 Pac. 523; Beckett v. Stuart, 23 Cal. App. 373, 138 Pac. 115; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Williams v. Hawkins, 20 Cal. App. 161, 128 Pac. 754; San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378; Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

6. See supra, § 357.

7. California Sav. Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395.

8. Scott v. Hollywood Park Co., 176 Cal. 680, 169 Pac. 379; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024; Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025.

9. San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378; Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

10. Noyes v. Huffman, 41 Cal. App. 676, 183 Pac. 284. See infra, §§ 361, 362.

§ 361. Effect of Failure Prior to 1919.—Prior to the amendment of 1919,[11] there was some uncertainty as to the proper procedure where the appellant failed to print the portions of the record relied upon in his brief. In some cases the appellate court, although not required to do so,[12] in fact looked at the typewritten transcript in order not to prevent or delay a determination of the appeal on its merits.[13] In other cases the court affirmed the judgment or order appealed from on the ground that the record failed to show error,[14] presuming that the appel-

11. See infra, § 362.

12. See supra, § 360.

13. Hawley v. State Assurance Co., 59 Cal. Dec. 119, 187 Pac. 1; Tucker v. Scott, 181 Cal. 734, 186 Pac. 150; Service v. Bedros, 180 Cal. 519, 182 Pac. 26; Miller v. Oliver, 174 Cal. 404, 163 Pac. 357; Pearson v. Parsons, 173 Cal. 336, 159 Pac. 1173; Thompson v. Hamilton Motor Co., 170 Cal. 737, Ann. Cas. 1917A, 677, 151 Pac. 122; O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633; Smyth v. Fitch, 32 Cal. App. Dec. 228, 190 Pac. 1049; Avery v. Hagenios, 30 Cal. App. Dec. 985, 187 Pac. 119; Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024; Dupes v. Dupes, 29 Cal. App. Dec. 685, 184 Pac. 425; Arthur v. Fetterman, 29 Cal. App. Dec. 128, 183 Pac. 307; Covel v. Price, 39 Cal. App. 646, 179 Pac. 540; Huffaker v. McVey, 35 Cal. App. 302, 169 Pac. 704; Robertson v. Ballou, 29 Cal. App. 711, 157 Pac. 523; Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

14. Chandlee v. McCalla, 179 Cal. 678, 178 Pac. 709; Scott v. Hollywood Park Co., 176 Cal. 680, 169 Pac. 379; Noyes v. Huffman, 41 Cal. App. 676, 183 Pac. 284; Tobey v. Randall, 41 Cal. App. 292, 182 Pac. 771; Ockenden v. Cutting, 41 Cal. App. 138, 182 Pac. 307; City Street Improvement Co. v. Silvershield, 40 Cal. App. 597, 181 Pac. 393 (awarding respondents fifty dollars for frivolous appeal); Dutwiler v. Klunk, 37 Cal. App. 796, 174 Pac. 919; Wheeler v. Houston, Gore & Loy, 37 Cal. App. 407, 174 Pac. 121; Moore v. Guajardo, 37 Cal. App. 342, 174 Pac. 92; McLaren v. Hards, 39 Cal. App. 104, 178 Pac. 332; Pitt v. Pensinger, 37 Cal. App. 199, 173 Pac. 598; Borba v. De Mello, 36 Cal. App. 601, 172 Pac. 1113; Anderson v. Wilcox, 36 Cal. App. 430, 172 Pac. 398; Barker Bros. v. Joos, 36 Cal. App. 311, 171 Pac. 1085; Anderson v. Recorder's Court, 36 Cal. App. 123, 171 Pac. 812; Stewart v. Andrews, 35 Cal. App. 230, 169 Pac. 397; Jones v. American Potash Co., 35 Cal. App. 128, 169 Pac. 397; Easterly v. Praul, 35 Cal. App. 39, 169 Pac. 396; Lillard v. Abbott Hardware Co., 34 Cal. App. 719, 168 Pac. 707; McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887; Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283.

lant had, by his brief, presented all portions of the record, which he desired to call to its attention.[15] Indeed, it has been said that this is the only order which could properly have been made,[16] and that for the court to have departed from its rule of conduct and examined the transcript for matters not printed in the briefs would have been in effect to have repealed the code provision requiring such printing.[17] It is worthy of note that except for a single case, in which the court acted "without assuming to establish any precedent thereby,"[18] it does not appear that any judgments or orders were reversed due to the voluntary action of the appellate court in examining the typewritten transcript.[19] The omission to print the record in the brief was not a ground for dismissal of the appeal, for the courts recognized that counsel for appellant and respondent might enter into an understanding designed to obviate the necessity of printing.[20]

§ 362. **Amendment of 1919.**—As a result of the action of the courts in affirming judgments on appeal upon what was printed in appellant's brief or supplement thereto, and without referring to the typewritten transcript,[1] the 1919 legislature in its wisdom, and to relieve some attorneys "from the consequences of acts due to indolence or

15. Anderson v. Wilcox, 36 Cal. App. 430, 172 Pac. 398; Blochman Commercial & Sav. Bank v. Ketcham, 36 Cal. App. 284, 171 Pac. 1084; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Williams v. Hawkins, 20 Cal. App. 161, 128 Pac. 754.

16. Jones v. American Potash Co., 35 Cal. App. 128, 169 Pac. 397.

17. McLaren v. Hards, 39 Cal. App. 104, 178 Pac. 332.

18. Avery v. Hagenios, 30 Cal. App. Dec. 985, 187 Pac. 119.

19. See, generally, the cases cited in note 13, this section. In Pearson v. Parsons, 173 Cal. 336, 159 Pac. 1173, where the decision rendered below was affirmed after an examination of the typewritten transcript, the court said that if it had been necessary to reverse the case for error in the ruling complained of, it was doubtful if the court would have been able to consider the point over the objection of the respondent that the matter was not properly presented to the court for decision.

20. Verdier v. Stoll, 36 Cal. App. 573, 172 Pac. 1127.

1. See supra, § 361

incompetency,"[2] amended the code section requiring the printing of portions of the record in the brief, by adding the following provision:

"No appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record or any part thereof in support of his points, but in such case the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief. The court shall fix the time within which such supplement shall be served and filed and shall permit or require such additional portions of the record to be printed, served and filed as may be desirable for the full presentation of the points at issue."[3]

This amendment has been severely criticised.[4] It has been said that it makes the appellate court an adjunct of the law school, requiring it to say to a party, "You have failed to read or observe an unmistakably plain provision of the statute; therefore we will allow you time in which to do this";[5] that it is well calculated to relieve the attorney for the appellant of responsibility to his client, thus encouraging indolence and negligence.[6] It must be observed, however, that it does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the alternative method of preparing the record.[7]

2. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302.

3. Code Civ. Proc., § 953c, as amended by Stats. 1919, p. 261.

4. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302; Avery v. Hagenios, 30 Cal. App. Dec. 985, 187 Pac. 119.

5. Avery v. Hagenios, 30 Cal. App. Dec. 985, 187 Pac. 119.

6. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302.

7. Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024; Friend & Terry Lumber Co. v. Devine, 31 Cal. App. Dec. 511, 188 Pac. 1007.

§ 363. Effect of Failure Since 1919.—Since the adoption of the amendment of 1919,[8] the law has been clear and explicit as to the action to be taken by the court when a party fails to comply with the requirement that he print portions of the record in his brief.[9] The court may not now dismiss the appeal for this cause,[10] or determine it adversely.[11] Its power is restricted to a continuance of the hearing of the appeal,[12] and to the issuance of directions for the printing of supplements to the brief.[13] The court may find it preferable, however, to examine the typewritten record, rather than to require that a supplement be prepared.[14] In this connection it may be noted that there are no legislative directions as to the course to pursue when there has been an ostensible, but inadequate, effort to supply relevant parts of the record, and the court may, therefore, find it necessary to make an independent research through the transcript.[15] It has been pointed out that counsel for a respondent may prevent delay in the hearing of an appeal by at once, upon the service of a defective brief, applying to the court for an order directing appellant to serve and file a supplemental record, as required by the amended section, and, upon an order extending his time therefor, postpone the filing of his brief until a proper record is presented.[16]

8. See supra, § 362.

9. Friend & Terry Lumber Co. v. Devine, 31 Cal. App. Dec. 511, 188 Pac. 1007.

10. Kinderman v. Shipley, 32 Cal. App. Dec. 87, 190 Pac. 472. This was true even prior to 1919. Verdier v. Stoll, 36 Cal. App. 573, 172 Pac. 1127.

11. Lawrence v. Long Beach Pleasure Pier Co., 30 Cal. App. Dec. 625, 186 Pac. 606; Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302; Avery v. Hagenios, 30 Cal. App. Dec. 985, 187 Pac. 119.

12. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302.

13. See Code Civ. Proc., § 953c, as amended by Stats. 1919, p. 261 (quoted supra, § 362).

14. Kinderman v. Shipley, 32 Cal. App. Dec. 87, 190 Pac. 472; Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024; Dupes v. Dupes, 29 Cal. App. Dec. 685, 184 Pac. 425.

15. Lawrence v. Long Beach Pleasure Pier Co., 30 Cal. App. Dec. 625, 186 Pac. 606.

16. Palmer v. Guaranty Trust & Sav. Bank, 31 Cal. App. Dec. 262, 188 Pac. 302.

On a motion to require the appellant to print and serve a supplement to his brief, setting forth additional evidence, the court will not examine all the evidence to determine whether any material evidence has been omitted where the moving party fails to point out the evidence which he claims is material and has been omitted.[17]

§ 364. **Sufficiency in General.**—It may safely be laid down as a rule of practice clearly intended by the legislature to be observed in the preparation of appeals under the alternative system that whatever may be necessary—whether the evidence or the pleadings, the findings, conclusions of law and judgment or such interlocutory motions and orders as may have been made during the pendency of the litigation and during the trial—to a clear explanation of the points relied upon or to a lucid exposure of the relevancy, pertinency, force or importance of such points in their hearing upon the ultimate issue submitted for decision, should be inserted, in printed form, in a supplement appended to the brief.[18] In other words, it seems that the legislature, in providing the so-called "alternative method" of preparing the record on appeal, contemplated that the parties should print in their briefs or in a supplement thereto so much of the record as under the old method would have been embodied in a bill of exceptions.[19] It is insufficient merely to indicate in the brief the portions of the record relied on by simply citing the page of the transcription where such portion may be found.[20] The

17. Friend & Terry Lumber Co. v. Devine, 31 Cal. App. Dec. 511, 188 Pac. 1007.

18. San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378, per Hart, J., pointing out, however, that rules of practice should be declared by the supreme court.

19. McLaren v. Hards, 39 Cal. App. 104, 178 Pac. 332. To the same general effect, see San Joaquin etc. Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378.

20. Borba v. De Mello, 36 Cal. App. 601, 172 Pac. 1113; Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025; Williams v. Hawkins, 20 Cal. App. 161, 128 Pac. 754; San Joaquin etc. Irr. Co.

legislature did not intend, however, that the appellant should be required to print in his brief all the testimony appearing in the record, or even all the testimony relating to the points urged by him for reversal.[1] Obviously, a party is required to print in his brief the portions of the record in support of his points and is not required to print portions of the record that are immaterial and have no bearing on the questions presented.[2] However, the court may, by piecing together a scrap of the record printed in one brief with scraps found in other briefs, find enough material for a decision on the merits.[3]

§ 365. Sufficiency in Particular Cases.—As we have seen in the preceding section, the law requires that enough of the record be printed in the briefs to illustrate the points made and to enable the court to determine those points. Just exactly what must be printed in any particular case in order to comply with this requirement necessarily depends upon the circumstances of the case.[4] Where it is claimed that the evidence is insufficient to justify the findings, it is insufficient to print in the brief merely five pages of testimony out of one hundred and fifty in the reporter's transcript.[5] Where the appeal from a judgment for breach of a written contract is taken on the ground that the complaint fails to allege nonperformance of any act required, fragmentary references to a

v. Stevinson, 16 Cal. App. 235, 116 Pac. 378; Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

1. De Bock v. De Bock, 29 Cal. App. Dec. 833, 184 Pac. 890.

2. Friend & Terry Lumber Co. v. Devine, 31 Cal. App. Dec. 511, 188 Pac. 1007.

3. Southern California Iron & Steel Co. v. Maier, 36 Cal. App. 531, 172 Pac. 615.

4. Opinion of the supreme court denying hearing of California Savings etc. Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395, but criticising the statement of the district court of appeal that in every case in which it is claimed that the evidence is insufficient or irrelevant, the printing of the complaint and answer cannot be dispensed with.

5. McKinnell v. Hansen, 34 Cal. App. 76, 167 Pac. 887.

single disconnected clause of the contract is insufficient.[6] Where the appeal is from an action to set aside a decree in a previous action for the foreclosure of a mortgage, the brief is insufficient if it does not print the pleadings or findings in the foreclosure case.[7] It is not a compliance with the procedure governing appeals under the so-called alternative method for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence, material to the point made on the appeal, should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein.[8]

VIII. Time for Filing Transcript.

Period Allowed.

§ 366. In General.—The time within which the transcript must be filed is regulated by a rule of the supreme court.[9] This rule reads in part as follows:

"The appellant in a civil action shall, within forty days after an appeal is perfected, except as hereinafter stated, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken."[10]

This states the general rule, but the time within which a transcript may be filed does not in all cases commence to run from the date of perfecting the appeal.[11] Thus it is

6. Chandlee v. McCalla, 179 Cal. 678, 178 Pac. 709.

7. Hawley v. State Assur. Co., 59 Cal. Dec. 119, 187 Pac. 1.

8. Eddy v. Stowe, 30 Cal. App. Dec. 318, 185 Pac. 1024.

9. Winder v. Hendrick, 54 Cal. 275.

10. Subd. 1 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix. Substantially the same rules may be found in 144 Cal. xxxix, 79 Pac. vii, 130 Cal. xxxv, 64 Pac. vii; 64 Cal. 635, 52 Cal. 677, and in 41 Cal. 695.

11. Kelly v. Ning Yung etc. Assn., 138 Cal. 602, 72 Pac. 148; Somers v. Somers, 83 Cal. 621, 24 Pac. 162 (where Beatty, C. J., makes the statement given in the text).

the rule, under the present practice, that the time does not commence to run pending the settlement of a bill of exceptions,[12] or the preparation of a reporter's transcript;[13] and it was the rule, under the former practice, that the time did not commence to run pending the settlement of a statement,[14] or the disposition of a motion for a new trial.[15]

The running of the forty-day period is not postponed, however, by the pendency of a previous motion to dismiss the appeal;[16] nor by the pendency of a motion by the appellant to vacate and modify the judgment under sections 663 and 663a of the Code of Civil Procedure;[17] nor by the practice of taking several appeals in a single transcript;[18] nor by the rule of the supreme court providing that if the attorney for the respondent refuses to certify the transcript within five days, the costs of procuring a certificate from the clerk shall be assessed against him.[19]

§ 367. Proceedings for Bill of Exceptions.—The rule of the supreme court which requires the filing of the transcript within forty days after an appeal is perfected contains this further provision:

"If a proceeding for the settlement of a bill of exceptions which may be used in support of such appeal is

12. See infra, §§ 367–370.

13. See infra, § 371.

14. Bryan v. Tevis, 177 Cal. 626, 171 Pac. 433; Cox v. Palos Verdes Co., 172 Cal. 702, 158 Pac. 332; Castro v. Breidenbach, 143 Cal. 335, 76 Pac. 1114; Vinson v. Los Angeles Pac. R. Co., 141 Cal. 151, 74 Pac. 757; Bernard v. Sloan, 138 Cal. 746, 72 Pac. 360; Kelly v. Ning Yung etc. Assn., 138 Cal. 602, 72 Pac. 148; Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Estate of Scott, 124 Cal. 671, 57 Pac. 654.

15. See infra, § 372.

16. Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148; White v. White, 112 Cal. 577, 44 Pac. 1026.

17. Modoc Co-operative Assn. v. Porter, 11 Cal. App. 270, 104 Pac. 710.

18. Butler v. Soule, 117 Cal. 226, 49 Pac. 5. As to the effect of proceedings for the settlement of a bill relating to another order, see infra, § 369.

19. Bethell v. Rogers, 100 Cal. 175, 34 Pac. 645, referring to rule XI (see COSTS).

pending or may still be instituted, the time aforesaid shall not begin to run until the settled and authenticated bill of exceptions has been filed, or the time in which a proceeding for such a bill of exceptions may be instituted has expired, or such proceeding if instituted has been dismissed by the trial court."[20]

This rule is framed for the purpose of affording the appellant a reasonable time within which to prepare and file the record upon which his appeal is to be heard, and should be construed as giving him the whole of this time to prepare that record after it is ready for preparation.[1] The rule assumes that it will sometimes happen (in fact, it generally happens) that a bill of exceptions which may be used in support of a particular appeal will remain unsettled for some time after the appeal is perfected, and its unmistakable intent is, that in such cases the time allowed for filing the transcript shall not begin to run until the bill is settled or until the proceeding to obtain a settlement is abandoned or dismissed, or in some way definitely disposed of.[2] Under this rule, if the time within which the bill of exceptions may be proposed or settled has not expired, or if proceedings for its settlement are still pending before the judge and undetermined by him,[3] or if forty days have not elapsed after its settlement,[4] the appellant cannot be said to be in default because his transcript has not been filed.

§ 368. Effect of Pendency of Bill.—Pursuant to the rule of the supreme court previously quoted,[5] the decisions

20. Subd. 1 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix. The same general principle is stated in different terms, applicable to statements as well, in 130 Cal. xxxv, 64 Pac. vii, 64 Cal. 635, 52 Cal. 677, and in 41 Cal. 695.

1. Wall v. Mines, 128 Cal. 136, 60 Pac. 682.

2. Kelly v. Ning Yung etc. Assn., 138 Cal. 602, 72 Pac. 148.

3. White v. White, 112 Cal. 577, 44 Pac. 1026.

4. Newman v. Bank of California, 2 Cal. Unrep. 793, 15 Pac. 43.

5. See supra, § 367.

hold that if there be a bill of exceptions which may be used in support of the appeal, the forty days allowed by the rule for filing the transcript does not commence to run until such bill is settled.[6] Accordingly, an appellant is entitled to forty days after the settlement of a bill of exceptions in which to file a transcript.[7] A refusal of the judge to settle a bill of exceptions ordinarily starts the period running the same as a settlement,[8] but it seems that if the appellant has been endeavoring in good faith to perfect his appeal, and has obtained a writ of mandate directing the judge to settle the bill, he may still file his transcript.[9] The fact that proceedings for the settlement of the bill have been delayed is immaterial if the right to a settlement has not been absolutely lost.[10]

Of course, where there is no proceeding for the settlement of a bill of exceptions pending within forty days after the perfecting of the appeal, the rule under discussion does not apply.[11] Neither does it apply if there is no proceeding for a bill which is applicable to the matter appealed from, even if there is a proceeding for a bill on an order subsequent thereto.[12]

§ 369. **Bill Relating to Another Order.**—While proceedings for the settlement of a bill of exceptions postpone the

6. Bryan v. Tevis, 177 Cal. 626, 171 Pac. 433; Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543; Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Somers v. Somers, 83 Cal. 621, 24 Pac. 162; Blaney v. Cline, 32 Cal. App. Dec. 1106, 192 Pac. 549; Gilmore v. American F. Ins. Co., 2 Cal. Unrep. 190.

7. Estate of Depeaux, 118 Cal. 522, 50 Pac. 682; White v. White, 112 Cal. 577, 44 Pac. 1026 (holding that the burden of proof is on the appellant to show that he is entitled to the exception given by this rule); In re Burton, 93 Cal. 613, 29 Pac. 224; McGrath v. Hyde, 71 Cal. 454, 12 Pac. 497; Hyde v. Boyle, 3 Cal. Unrep. 309, 24 Pac. 1060; Horton v. Dominguez, 2 Cal. Unrep. 548, 8 Pac. 273; Reay v. Butler (Cal.), 25 Pac. 350.

8. White v. White, 112 Cal. 577, 44 Pac. 1026.

9. In re Burton, 93 Cal. 613, 29 Pac. 224.

10. See infra, § 370.

11. Estate of Depeaux, 118 Cal. 522, 50 Pac. 682; Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868.

12. See infra, § 369.

running of the forty-day period for filing the transcript,[13] the bill of exceptions referred to is that which is applicable to the matter appealed from,[14] for the practice of filing a single transcript for several appeals does not obviate the necessity of complying with the rule that the transcript must be filed within the time limited by law.[15] Consequently, it is the rule that the pendency of proceedings to settle a bill of exceptions to an order after judgment does not affect the time for filing the transcript on an appeal from the judgment itself.[16] Thus it has been held that the time to file a transcript on an appeal from a judgment is not postponed by reason of the pendency of proceedings for the settlement of a bill of exceptions taken on an order relating to a writ of assistance,[17] or on an order disposing of a motion to vacate the judgment,[18] or on an order denying a motion for change of place of trial.[19] Furthermore, where the appeal as to certain respondents is taken on the judgment-roll, the time for filing the transcript as to them is not extended by reason of the fact that the appellant is preparing a bill of exceptions to support an appeal against other respondents.[20] Under the former practice, allowing appeals from orders denying new trials, the fact that a bill of exceptions used on a motion for a new trial might have been used on an appeal from the judgment if settled and filed in time, did not extend the time for perfecting the appeal from the judgment beyond forty days after the settlement of the bill pertaining to such judg-

13. See supra, §§ 367, 368.

14. Butler v. Soule, 117 Cal. 226, 49 Pac. 5; Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329.

15. Butler v. Soule, 117 Cal. 226, 49 Pac. 5.

16. Pignaz v. Burnett, 121 Cal. 292, 53 Pac. 633; Butler v. Soule, 117 Cal. 226, 49 Pac. 5.

17. Pignaz v. Burnett, 121 Cal. 292, 53 Pac. 633.

18. Butler v. Soule, 117 Cal. 226, 49 Pac. 5.

19. Nutley v. Metropolitan Const. Co., 13 Cal. App. 588, 110 Pac. 331; Union Lumber Co. v. Metropolitan Const. Co., 13 Cal. App. 584, 110 Pac. 329.

20. Emeric v. Alvarado, 106 Cal. 646, 40 Pac. 11.

ment. Nevertheless, to obviate the necessity of printing two transcripts, the supreme court often extended the time for filing the transcript on an appeal from the judgment.[1]

§ 370. Delay or Failure in Settlement.—Delay in settling a bill of exceptions does not prevent the tolling of the period for filing the transcript,[2] provided the proceeding for settlement is still pending.[3] In this connection it has been pointed out that the effect of laches in procuring a settlement is ordinarily for the trial court to determine,[4] and that the trial court, upon application made in proper time, may relieve a party from the effects of his failure to serve a proposed bill within the prescribed time.[5] Accordingly, even where fifteen months is spent in obtaining a bill of exceptions, the time for filing the transcript will not expire if this delay is not unreasonable.[6] Certainly delay in having a bill settled is immaterial if it is not occasioned by the negligence of the appellant's counsel.[7]

Nevertheless, it has been pointed out that the ruling providing for an extension of the time for filing a transcript by reason of the pendency of proceedings for the settlement of a bill of exceptions contemplates a proceeding for a settlement that is alive, at least to the extent that it is being in some degree pressed by the appellant, and it has therefore been held that the time is not extended if the right to have a bill settled has unquestionably been lost by appellant's delay.[8] If the appellant,

1. Bell v. Southern Pac. R. Co., 137 Cal. 77, 69 Pac. 692.

2. Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480 (settlement of statement); McGrath v. Hyde, 71 Cal. 454, 12 Pac. 497; Baker v. Eilers Music Co., 24 Cal. App. 348, 141 Pac. 395; Reay v. Butler (Cal.), 25 Pac. 350.

3. See infra, this section.

4. Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480; McGrath v. Hyde, 71 Cal. 454, 12 Pac. 497; Reay v. Butler (Cal.), 25 Pac. 350.

5. Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543. See supra, §§ 64–66.

6. Baker v. Eilers Music Co., 24 Cal. App. 348, 141 Pac. 395.

7. Blaney v. Cline, 32 Cal. App. Dec. 1106, 192 Pac. 549.

8. Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112, and Harbaugh v. Lassen Irr. Co., 24 Cal. App. 773,

therefore, has taken no action for a period of more than six months after the service of the proposed amendments of the respondent, there is no proceeding pending for the settlement of the bill.[9] A neglect upon the part of the appellant for forty days to take steps to secure a settlement is of course equivalent to his failure to file the transcript within the time limited.[10]

If proceedings for a bill of exceptions are pending, the running of the period is postponed regardless of the ultimate success or failure of the proceeding.[11] Consequently, if a proceeding for the settlement of a bill of exceptions is still pending in the trial court, the appellate court, in considering a motion to dismiss the appeal for failure to file the transcript in time, will not ordinarily inquire as to whether the proceeding can ultimately avail and the bill be legally settled.[12]

§ 371. Proceedings for Reporter's Transcript.—The general rule requiring that the transcript be filed within forty days after the perfection of the appeal was made prior to the enactment of the code section providing for the alternative method of preparing the record,[13] and was at first held inapplicable to the filing of a transcript which

142 Pac. 847 (both cases holding that where the appellant has failed to present his proposed bill in the time required and has failed to take steps to be relieved from this default in the period allowed, the proceeding for settlement is no longer pending). To the same effect, see, also, Rath v. Vaughan, 30 Cal. App. Dec. 911, 187 Pac. 44.

9. Howse v. Norwich Union F. Ins. Co., 10 Cal. App. 712, 103 Pac. 156.

10. Estate of Depeaux, 118 Cal. 522, 50 Pac. 682; Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868.

11. Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543; Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082 (citing also Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480, and White v. White, 112 Cal. 577, 44 Pac. 1026).

12. Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543.

13. Estate of Keating, 158 Cal. 109, 110 Pac. 109. See, also, the various citations of subd. 1 of rule II of the supreme court given supra, § 366.

did not need to be printed.[14] Subsequently, however, the rule was modified by the addition of the following provision:

"If the transcript for use on appeal is prepared under the provisions of section 953a of the Code of Civil Procedure and a notice is filed by the appellant requesting a transcript under said section, the time for filing the transcript of the record on appeal shall not begin to run until such transcript is approved and certified as required by law, or until the proceeding to obtain the same has been terminated in the court below by dismissal or otherwise."[15]

Under one alternative of this rule, the date of the certification of the transcript by the judge or the clerk, as the case may be, marks the time of the completion of the preparation of the transcript and must, therefore, be regarded as the date from which the time within which the transcript must be filed in the appellate court begins to run.[16] It has been observed that there seems to be no limit of time provided by the rule within which the transcript must be prepared.[17]

Under the other alternative of this rule, it is the dismissal by the lower court which starts the time running. In this connection it has been held that an appeal from the order of dismissal does not ipso facto operate to prevent the running of the time, although it has been suggested that in a case involving a gross abuse of discretion, the appellate court would excuse the failure to file the transcript pending a diligent prosecution of the appeal from the order of dismissal.[18]

14. Estate of Keating, 158 Cal. 109, 110 Pac. 109; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686.

15. Subd. 1 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 78 Pac. vii; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686.

16. Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; citing Shaw v. Blasevich, 21 Cal. App. 498, 132 Pac. 278.

17. Shaw v. Blasevich, 21 Cal. App. 498, 132 Pac. 278.

18. Williams v. Williams, 176 Cal. 230, 168 Pac. 19.

§ 372. Pendency of Motion for New Trial.—The rule requiring that the transcript be filed within forty days after the perfection of the appeal formerly provided that if the appellant had given notice of a motion for a new trial, the time for filing the transcript should not begin to run until the motion for a new trial had been decided or the proceeding dismissed for want of prosecution.[19] This provision took effect February 18, 1905, and was held applicable to a case in which the proceeding to dismiss the appeal was made after that date.[20] Its purpose was to give the appellant an opportunity, if he so desired, to present his appeals from the judgment and from the order denying a new trial upon the same transcript. To give effect to this purpose it was necessary to construe it as meaning that the time for filing the transcript did not begin to run until the order denying or dismissing the motion for a new trial had not only been made, but had also been either entered on the minutes of the superior court or filed with the clerk thereof, so as to give an immediate right of appeal therefrom. But notice of the entry of the order denying motion for new trial, or the perfecting of an appeal from such order, was not necessary.[1]

An order dismissing a motion for a new trial on the ground that it was not prosecuted with due diligence was in effect one denying the motion, and started the running of the period;[2] but an order granting a new trial provided

19. Subd. 1 of rule II of the supreme court: 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; Bryan v. Tevis, 177 Cal. 626, 171 Pac. 433; Robinson v. Robinson, 158 Cal. 117, 110 Pac. 112; People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; Pollitz v. Wickersham, 147 Cal. 371, 81 Pac. 1099; Shepard v. F. A. Robbins Press Works, 7 Cal. Unrep. 259, 85 Pac. 307. This provision no longer appears in the court rules, since an order disposing of a motion for a new trial is now appealable only in one special case. See supra, § 34.

20. Pollitz v. Wickersham, 147 Cal. 371, 81 Pac. 1099. Prior to the adoption of this provision, the pendency of proceedings for a new trial did not postpone the time for filing the transcript. Smith v. Trefry, 71 Cal. 404, 12 Pac. 351.

1. Bell v. Staacke, 148 Cal. 404, 83 Pac. 245, per Shaw, J.

2. Bryan v. Tevis, 177 Cal. 626, 171 Pac. 433 (holding that the time

one party did not consent to an order to be prepared by the other party, did not start the running of the time for filing the transcript until the order prepared by the party was served.[3]

Assuming, without deciding, that this proviso was applicable where an appellant first perfected his appeal and then gave notice of motion for new trial, the court said that it was clearly inapplicable if more than forty days had elapsed since the motion was denied and if no transcript had been filed.[4] Furthermore, where a motion for new trial did not lie, as in proceedings to set apart a probate homestead, the time for filing the transcript was not extended by an attempt to take such proceedings.[5]

§ 373. Extension by Stipulation.—The rules of the supreme court provide that the time limited for filing the transcript "may be extended by written stipulation or by order, based on affidavit, showing good cause therefor."[6]

The fact that the transcript was filed agreeably to stipulation is a sufficient answer to a motion to dismiss the appeal on the ground that no transcript has been filed in time.[7] Furthermore, it has been held that a stipulation extending the time for filing the transcript, like an order of the court for the same purpose,[8] may be given effect although not filed with the clerk.[9] Where a substituted

for filing the transcript began to run at least when the court made an order finally denying the motion to vacate the order dismissing proceedings).

3. Shepard v. F. A. Robbins Press Works, 7 Cal. Unrep. 259, 85 Pac. 307.

4. Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868.

5. Estate of Heywood, 154 Cal. 312, 97 Pac. 825.

6. Subd. 3 of rule II of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli. The rules stated in 144 Cal. xxxix, 79 Pac. vii, contain substantially the same provision. The rules stated in 130 Cal. xxxv, 64 Pac. vii, 64 Cal. 635, 52 Cal. 677, and 41 Cal. 695, are to the same general effect, but provide further that extension by the court may not exceed twenty days.

7. Fisher v. Western Fuse etc. Co., 12 Cal. App. 299, 107 Pac. 332 (and other cases turning on the same point, reported in 12 Cal. App. 307, 308, 107 Pac. 335.

8. See infra, § 374.

9. Poupion v. Muzio, 68 Cal. 235, 9 Pac. 97.

bond on appeal is filed by stipulation, it seems that the forty-day period begins to run from the time of such filing.[10] The time for filing the transcript is not extended, however, by a stipulation to that effect if the consideration therefor has failed.[11] Neither is it extended by a stipulation extending the time for the appellant's sureties to justify.[12]

§ 374. Extension by Order.—Pursuant to the rule previously set forth,[13] the courts have often recognized the right to extend the time for filing the transcript by court order.[14] Indeed, it is the practice to be liberal in extending the time for filing transcripts where no delay in the hearing of the case can result.[15] Thus, where an appeal is taken from a judgment and also from an order rendered after judgment, the court, to obviate the necessity of preparing two transcripts, has often extended the time for filing the transcript on the appeal from the judgment.[16] Similarly, where the appellant appeals and also asks for mandamus, the court has allowed forty days after

10. Hofer v. Grundy, 24 Cal. App. 686, 142 Pac. 102.

11. Raymond v. McMullen, 90 Cal. 122, 27 Pac. 21 (and other cases turning on the same question, reported in memorandum decision in 27 Pac. 22).

12. Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160.

13. Subd. 3 of rule II of the supreme court (see supra, § 373).

14. Bell v. Southern Pacific R. Co., 137 Cal. 77, 69 Pac. 692; Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Rumfelt v. Trinity River Canal etc. Co., 83 Cal. 649, 24 Pac. 276; Desmond v. Faus, 83 Cal. 134, 23 Pac. 303; Hubback v. Ross, 79 Cal. 564, 21 Pac. 965; Grant v. De Lamori, 71 Cal. 329, 12 Pac. 228; Smith v. Arnold, 60 Cal. 234; Meeker v. Hoffer, 57 Cal. 140; Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868; Gabel v. Page, 4 Cal. App. 509, 88 Pac. 591; Hart v. Kimberly, 5 Cal. Unrep. 532, 46 Pac. 618; Brunnings v. Townsend, 6 Cal. Unrep. 647, 64 Pac. 106. See, however, Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329, where the court, after referring to the right to extend the time for filing the brief, says that "no such provision is made as to the filing of the transcript on appeal."

15. Goble v. Page, 4 Cal. App. 509, 88 Pac. 591.

16. Bell v. Southern Pac. R. Co., 137 Cal. 77, 69 Pac. 692.

the determination of the application for mandamus in which to file the transcript on appeal.[17] The supreme court, however, has expressed its unqualified disapproval of the growing habit of attorneys in asking for extensions on the ground that the printer has failed to print the transcript in time.[18] An extension of time to file a transcript, granted by four associate justices, is equivalent to an extension of time for the same purpose by the court,[19] and may be given effect although not filed with the clerk.[20] Under a present rule of court, the chief justice of the supreme court and the presiding justices of the district courts of appeal are authorized to extend the time for filing records.[1] An order extending the time to file a transcript cannot be attacked on motion to dismiss the appeal.[2]

Effect of Delay.

§ 375. **In General.**—If the transcript is not filed within the time required by law,[3] before notice of a motion to dismiss the appeal,[4] and if there is no excuse for this default,[5] the appeal will be dismissed on motion of the respondent.[6] This is but an application of a rule of the supreme court, which provides as follows:

"If the transcript of the record . . . be not filed within the time prescribed, the appeal may be dismissed on mo-

17. Brunnings v. Townsend, 6 Cal. Unrep. 647, 64 Pac. 106, holding that the time commences to run with the filing of the decision in the mandamus proceeding, and not thirty days thereafter.

18. Hubback v. Ross, 79 Cal. 564, 21 Pac. 965.

19. Meeker v. Hoffer, 57 Cal. 140.

20. Desmond v. Faus, 83 Cal. 134, 23 Pac. 303; Grant v. De Lamori, 71 Cal. 329, 12 Pac. 228. As to the same rule applied to extension by stipulation, see supra, § 373.

1. Subd. 8 of rule II of the supreme court: 177 Cal. xlviii, 176 Pac. vii.

2. Gobel v. Page, 4 Cal. App. 509, 88 Pac. 591.

3. See supra, §§ 366–374.

4. See infra, § 448.

5. See infra, §§ 379, 380.

6. Cox v. Palos Verdes Co., 172 Cal. 702, 158 Pac. 332; Puckhaber v. Henry, 147 Cal. 424, 81 Pac. 1105; Bell v. Southern Pac. R. Co., 137 Cal. 77, 69 Pac. 692; Butler v. Soule, 117 Cal. 226, 49 Pac. 5; Tompkins v. Montgomery, 116 Cal.

tion, upon notice given. If the transcript, . . . though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion.''[7]

Where an appeal is dismissed for failure to file the transcript within the prescribed time, the dismissal, unless expressly made without prejudice,[8] is a bar to an-

120, 47 Pac. 1006; White v. White, 112 Cal. 577, 44 Pac. 1026; Bethell v. Rogers, 100 Cal. 175, 34 Pac. 645; Duncan v. Grady, 99 Cal. 552, 34 Pac. 112; Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; Judge v. Ohm, 89 Cal. 134, 26 Pac. 649; Hoyt v. San Francisco & N. P. R. R. Co., 87 Cal. 610, 25 Pac. 160, 1066; Coffey v. Grand Council, 87 Cal. 370, 25 Pac. 548; Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; Smith v. Solomon, 84 Cal. 537, 24 Pac. 286; Rumfelt v. Trinity River Canal etc. Co., 83 Cal. 649, 24 Pac. 276; Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160; Smith v. Trefry, 71 Cal. 404, 12 Pac. 351; Vaughn v. Werley, 62 Cal. 181 (holding that no damages can be affixed); Page v. Latham, 60 Cal. 601; Smith v. Arnold, 60 Cal. 234; In re Fifteenth Avenue Extension, 54 Cal. 604; Welch v. Kenney, 47 Cal. 414; Rath v. Vaughan, 30 Cal. App. Dec. 911, 187 Pac. 44; Palmer v. Woodruff, 30 Cal. App. 251, 157 Pac. 1137; Briles v. Paulson, 28 Cal. App. 461, 152 Pac. 942; McCowen v. Trumann, 22 Cal. App. 361, 134 Pac. 341; Reynolds v. Planada Development Co., 21 Cal. App. 381, 131 Pac. 893; Gervais v. Joyce, 15 Cal. App. 189, 114 Pac. 409; Nutley v. Metropolis Const. Co., 13 Cal. App. 588, 110 Pac. 331; Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329; Colusa Milling Co. v. Draper Dray & Storage Co., 13 Cal. App. 329, 109 Pac. 504; Modoc Co-operative Assn. v. Porter, 11 Cal. App. 270, 104 Pac. 710; Howse v. Norwich Union Fire Ins. Soc., 10 Cal. App. 712, 103 Pac. 156; Stiavetti v. Unsworth, 10 Cal. App. 681, 103 Pac. 149; Prine v. Duncan, 5 Cal. App. 433, 90 Pac. 712; Johnson v. Goodyear Min. Co., 6 Cal. Unrep. 274, 57 Pac. 383; Hart v. Kimberly, 5 Cal. Unrep. 532, 46 Pac. 618; First Nat. Bank v. Kowalsky, 3 Cal. Unrep. 432, 27 Pac. 783; Vitoreno v. Corea, 3 Cal. Unrep. 343, 25 Pac. 420; McAvoy v. Bothwell, 2 Cal. Unrep. 717, 12 Pac. 161; Levy v. Everett (Cal.), 31 Pac. 111; In re Read's Estate (Cal.), 29 Pac. 245.

7. Subd. 1 of rule V of the supreme court: 177 Cal. xliii, 176 Pac. vii; 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii. Rule III of the supreme court: 64 Cal. 635, 52 Cal. 677. For discussion of the principle set forth in the second sentence of this rule, see infra, §§ 384, 441.

8. Anthony v. Grand, 99 Cal. 602, 34 Pac. 325 (holding that when the appeal is dismissed by such an order, the inadvertent entry of a subsequent order of absolute dismissal was ineffective).

other appeal,[9] being, in effect, an affirmance of the judgment.[10] Under a provision of a former rule providing that an appeal dismissed for failure to file the transcript might be restored on good cause shown,[11] the court required affidavits showing that the appeal had been taken in good faith and that, in the opinion of counsel at least, there were substantial errors in the record which ought to be corrected by the appellate court.[12]

§ 376. Certificate of Clerk Generally.—A rule of the supreme court provides as follows:

"On motion to dismiss an appeal for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk of the court below, certifying the nature of the action and the relief demanded by the complaint, the amount or character of the judgment or order appealed from, the fact and date of the settlement and filing of the bill of exceptions or the settlement of the transcript prepared under section 953a of the Code of Civil Procedure, if any, and the fact and date of the dismissal, if any, by the trial court of any proceeding for the settlement of a bill of exceptions or transcript."[13]

This certificate seems to be a necessary paper,[14] and if the respondent does not furnish it in substantial compliance with the rule, his motion to dismiss the appeal will be denied.[15] Nevertheless, it is merely evidence of cer-

9. Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170; Spinetti v. Brignardello, 54 Cal. 521.

10. Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170.

11. Rule III of the supreme court: 41 Cal. 695; 37 Cal. 705; 28 Cal. 686; 26 Cal. 693; 11 Cal. 408.

12. Hagar v. Mead, 25 Cal. 598.

13. Subd. 1 of rule VI of the supreme court: 177 Cal. xliii, 176 Pac. vii. A somewhat similar declaration appears as subd. 1 of rule VI in 160 Cal. xliii, 119 Pac. vii; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii; and as rule IV in 64 Cal. 635; 52 Cal. 677; 41 Cal. 695; 37 Cal. 705; 28 Cal. 686; 26 Cal. 693.

14. See Camenzind v. Kampfen, 130 Cal. 596, 62 Pac. 1073 (holding that in its absence an appeal will not be dismissed even on stipulation when no transcript has been filed to show who are the attorneys of record).

15. Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568 (denying motion

tain facts which the respondent must present on the hearing of his motion,[16] and is not a moving paper which must be served upon the appellant with the notice of the motion.[17] Furthermore, the right of the respondent to have the appeal dismissed does not depend upon the filing of a certificate before the transcript is filed or the motion is heard.[18]

§ 377. Sufficiency of Certificate.—The rule of the supreme court which prescribes the clerk's certificate supporting a motion to dismiss the appeal for failure to file the transcript in time has recently been changed in view of the present method of preparing the record,[19] and cases passing upon the sufficiency of certificates must be read with this in view. The supreme court, in an early case, observed that many of the certificates presented were radically defective, and set forth a convenient and accurate form, sufficient both in form and substance, which could be varied to suit different states of facts.[20] Where there is only one appeal taken, and only one court to which it could be taken, it has been held that the certificate need not show what judgment or order the appellant has appealed from, nor to what court he has appealed.[1]

On the other hand, a certificate seems to be insufficient if it does not state the amount or the character of the

without prejudice); Carpentier v. Bartlett, 62 Cal. 561; Frederick v. Tierney, 54 Cal. 583; Winder v. Hendrick, 54 Cal. 275; Lewis v. Longmaid, 43 Cal. 54; Thompson v. Thornton, 43 Cal. 24; Bennett v. Bennett, 42 Cal. 629; Gilmore v. American Fire Ins. Co., 2 Cal. Unrep. 190; In re Sweet's Estate, 3 Cal. Unrep. 485, 29 Pac. 249 (denying motion without prejudice).

16. Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895; Stiavetti v. Unsworth, 10 Cal. App. 681, 103 Pac. 149.

17. Stiavetti v. Unsworth, 10 Cal. App. 681, 103 Pac. 149.

18. Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895.

19. See various citations of rules VI and IV as given supra, § 376.

20. Gross v. Cassin, 43 Cal. 27. See, also, Erving v. Napa Valley Brewing Co., 16 Cal. App. 41, 116 Pac. 331, quoting portions of a certificate.

1. Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895.

judgment,[2] or the order or judgment appealed from,[3] or the names of the attorneys for the respective parties.[4] Under the former practice, a certificate was also defective if it did not state either the fact or the date of the service of the notice of appeal,[5] or the character of the evidence of the service,[6] or that an undertaking on appeal is in due form,[7] or that a statement on appeal had been settled,[8] or that such a statement had been filed.[9]

§ 378. **Evidence and Proof on Hearing.**—By a rule of the supreme court,[10] a motion to dismiss an appeal upon the ground that the transcript is not filed within the time prescribed is to be heard upon the certificate of the trial court.[11] It is contemplated by this rule that the matters therein mentioned should be stated in the certificate of the clerk, and not that they should be presented by documents on file in the court below,[12] or by affidavits.[13] Consequently, a statement in the undertaking on file as to the amount and character of the judgment cannot supply an omission in this respect in the certificate;[14] and an omission to state the fact and date of service of the

2. Lewis v. Longmaid, 43 Cal. 54; Bennett v. Bennett, 42 Cal. 629.

3. Lewis v. Longmaid, 43 Cal. 54.

4. Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568.

5. Carpentier v. Bartlett, 62 Cal. 561; Frederick v. Tierney, 54 Cal. 583; Thompson v. Thornton, 43 Cal. 24; Lewis v. Longmaid, 43 Cal. 54; Ellis v. Judson (Cal.), 10 Pac. 127; Geirnen v. Garrity (Cal.), 10 Pac. 118.

6. Thompson v. Thornton, 43 Cal. 24.

7. Lewis v. Longmaid, 43 Cal. 54.

8. Thompson v. Thornton, 43 Cal. 24.

9. Bennett v. Bennett, 42 Cal. 629.

10. Subd. 1 of rule VI of the supreme court (see supra, § 376).

11. Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568; Carpentier v. Bartlett, 62 Cal. 561; Bennett v. Bennett, 42 Cal. 629.

12. Bennett v. Bennett, 42 Cal. 629.

13. Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568; Carpentier v. Bartlett, 62 Cal. 561. The present rule, however, seems to contemplate affidavits with respect to matters which might extend the running of the period for filing. See infra, this section.

14. Bennett v. Bennett, 42 Cal. 629.

notice of appeal cannot be supplied by an affidavit of service.[15] Moreover, affidavits for the respondent cannot be considered for the purpose of showing the character of the records kept by the clerk, and from what order the appeal was taken.[16] There is no reason, however, why the appellate court should not consider an amended certificate, if material; but a respondent's request to file an additional certificate is not an abandonment of his right to have his motion determined on his original certificate.[17]

Burden of proof.—Upon a motion to dismiss an appeal for failure to file the transcript in time, it was formerly the rule that the respondent was only required to show in the first instance that more than forty days had expired since the perfecting of the appeal, and in the absence of any further showing on the part of the appellant, the appeal would be dismissed. If the appellant desired to avail himself of an exception to the rule that the filing must take place within forty days from the perfection of the appeal, the burden was upon him to show that he is within the exception, as by showing the pendency of proceedings for the settlement of a bill of exceptions.[18] Now, however, the court rule relating to the certificate of the clerk provides as follows:

"It shall be incumbent on the party moving to dismiss to show by such certificate or by affidavit that no proceeding for a bill of exceptions or transcript under section 953a is pending in the trial court, and if no such proceeding was ever instituted, that the time to institute the same has expired."[19]

§ 379. **Relief from Default Generally.**—Even if a transcript is not filed within forty days following the perfec-

15. Carpentier v. Bartlett, 62 Cal. 561.

16. Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568.

17. Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895.

18. White v. White, 112 Cal. 577, 44 Pac. 1026.

19. Subd. 1 of rule VI of the supreme court: 177 Cal. xliii, 176 Pac. vii.

tion of the appeal,[20] and if there are no circumstances postponing the running of the period,[1] no stipulation or order extending the time allowed,[2] and no filing before notice has been given of the motion to dismiss the appeal,[3] the appellate court may excuse the delay and allow the filing if the appellant has been free from inexcusable neglect.[4] In this connection it has been observed that rules of court are but a means to accomplish the ends of justice, and may be suspended in a particular case if the ends of justice require it.[5] More specifically, the court has said that good cause for failure to comply with the rule in regard to the filing of the transcript on appeal is always a sufficient answer to a motion to dismiss the appeal on the ground of such failure.[6] Indeed, the enforcement of the rule as to the time for filing a transcript is within the discretion of the appellate court, and the appellant will not be denied a hearing of his appeal on its merits if his default has not occasioned a material delay nor put the respondent to costs or inconveniences.[7] Leave given to file a transcript, however, is not equivalent to an extension of the prescribed time if the period of

20. See supra, § 366.

1. See supra, § 367 et seq.

2. See supra, §§ 373 (stipulation, 374 (order).

3. See infra, §§ 382–384.

4. Harpold v. Slocum, 168 Cal. 364, 143 Pac. 609; Robinson v. Robinson, 158 Cal. 117, 110 Pac. 112; Ward v. Healy, 110 Cal. 587, 42 Pac. 1071; Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Pickett v. Wallace, 54 Cal. 147; Welch v. Kinney, 47 Cal. 414 (holding that the facts excusing the delay should be set forth in affidavits presented at the hearing of the motion to dismiss the appeal); Stark v. Barnes, 2 Cal. 162; Friend & Terry Lumber Co. v. Devine, 30 Cal. App. Dec. 463, 186 Pac. 187; Continental Building & Loan Assn. v. Woolff, 11 Cal. App. 677, 106 Pac. 107; Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868; Brunnings v. Townsend, 6 Cal. Unrep. 647, 64 Pac. 106; Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402, 35 Pac. 310. Compare with Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329, where the court seems inclined to question this rule.

5. Pickett v. Wallace, 54 Cal. 147. See COURTS.

6. Robinson v. Robinson, 158 Cal. 117, 110 Pac. 112.

7. Brunnings v. Townsend, 6 Cal. Unrep. 647, 64 Pac. 106.

possible extension has expired. Neither is it an adjudication of the respondent's right to a dismissal if leave is granted subject to a pending motion of dismissal.[8] Of course, there will be no relief from the default if there is no showing that a record on appeal is in course of preparation and no excuse is offered for the appellant's failure to prepare it.[9]

§ 380. **Circumstances Justifying Relief.**—In applying the rule that a transcript may be filed after the time prescribed by law if there has been no inexcusable delay,[10] the California courts have considered various excuses. They have held delay in filing the transcript excusable where the appellate court, as constituted during the period limited, was incompetent to hear the appeal;[11] where the attorney for the appellant was called to a distant state on account of the illness of his mother;[12] where the appeal was taken during the illness of the attorney for the appellant and against his directions;[13] where the attorney for the appellants erroneously thought that the appeal was to be carried no further;[14] and where the appellant, a married woman suing for divorce, was seeking to obtain an order requiring the respondent, her husband, to pay the expense of printing the transcript.[15] So, also, the court has excused a very slight delay where the appellant, attempting to file the transcript, found the office of the clerk closed and left the copies with the clerk of another

8. Page v. Latham, 60 Cal. 601 (decided under the former rule of court limiting the possible period of extension to twenty days).

9. Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329.

10. See supra, § 379.

11. Pickett v. Wallace, 54 Cal. 147.

12. Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608.

13. Bates v. Schroeder, 3 Cal. Unrep. 21, 19 Pac. 121.

14. Friend & Terry Lumber Co. v. Devine, 30 Cal. App. Dec. 463, 186 Pac. 187.

15. Robinson v. Robinson, 158 Cal. 117, 110 Pac. 112. Compare with Hubback v. Ross, 79 Cal. 564, 21 Pac. 965, where orders extending the period allowed were upheld in view of the poverty of the appellant, although the reason for requesting an extension was misrepresented by counsel.

court to be delivered to the proper office.[16] Indeed, in view of the absence of decisions construing the rule allowing the filing of a written transcript with funds to pay for the printing thereof, the court in one case excused default in filing the printed transcript where the clerk accepted a written transcript upon assurances that a printed transcript would later be furnished.[17]

The courts have held, however, that delay in filing the transcript is not excused by the fact that the appellant was ill;[18] that there was an attempt to compromise;[19] that the attorney for the appellant failed to observe a settled rule of law;[20] that the attorney for the appellant through inadvertence or neglect overlooked the time for filing;[1] or that the attorney depended upon the clerk of the lower court to prepare and file the transcript for him.[2]

IX. MATTERS SUBSEQUENT TO FILING.

Defects and Objections.

§ 381. Effect of Defects.—In general, it may be said that where the transcript which is submitted fails to comply with the rules of court, no error appears on the face of the record, and the appellate court must assume that the judgment or order rendered below was justified.[3] In such case, therefore, the judgment rendered below may be affirmed,[4] or the appeal may be dismissed.[5] This dis-

16. Continental Building & Loan Assn. v. Woolff, 11 Cal. App. 677, 106 Pac. 107.

17. Ward v. Healy, 110 Cal. 587, 42 Pac. 1071.

18. Hart v. Kimberly, 5 Cal. Unrep. 532, 46 Pac. 618.

19. Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895.

20. Estate of Heywood, 154 Cal. 312, 97 Pac. 825 (failure to observe that proceedings for a new trial do not lie from an order refusing to set aside a probate homestead).

1. Gervais v. Joyce, 15 Cal. App. 189, 114 Pac. 409.

2. Ewing v. Napa Valley Brewing Co., 16 Cal. App. 41, 116 Pac. 331.

3. Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297.

4. Douglas v. Fulda, 54 Cal. 588.

5. Martin v. Hudson, 79 Cal. 612, 21 Pac. 1135.

missal is sometimes made contingent upon the failure of the appellant to correct the defect.[6] It has been said that where the omissions of the transcript are such as to show beyond all question that an examination of the case upon its merits would be useless, the appeal will be dismissed,[7] but the more recent view seems to be that in such cases, if the appellate court has acquired jurisdiction, the proper order is one of affirmance for lack of record showing error.[8] Ordinarily, however, it can matter little whether the form of the order be one of dismissal or one of affirmance.[9] There is an essential difference between a case in which the appellant has failed to take the proper steps for bringing his appeal before the court, and a case in which the appellant has, or is supposed to have, failed to make a record which, on being looked into, will disclose error in the judgment or order appealed from.[10]

Particular defects.—The effect of particular defects is noticed in this article at the various places where these defects are discussed. In connection with the rules as to what matters are required in the record, attention has been given to the effect of particular omissions, such as the omission of a showing of the jurisdiction of the court,[11] of the objections of the appellant,[12] of his exceptions,[13] of the grounds of a motion for a new trial,[14] of

6. Martin v. Hudson, 79 Cal. 612, 21 Pac. 1135.

7. Howell v. Howell, 101 Cal. 115, 35 Pac. 443; White v. White, 88 Cal. 429, 26 Pac. 236; Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; Miller v. Thomas, 78 Cal. 509, 21 Pac. 11; Norris v. Norris (Cal.), 28 Pac. 593.

8. Borges v. Dunham, 169 Cal. 83, 145 Pac. 1011; Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526 (the leading case); Howell v. Howell, 101 Cal. 115, 35 Pac. 443; Hancock v. Thom, 46 Cal. 643; Gates v. Buckingham, 4 Cal. 286; People v. Reynolds, 2 Cal. Unrep. 186; McLeod v. Davis, 1 Cal. Unrep. 766; Head v. Barney, 1 Cal. Unrep. 78; Newman v. Buckman (Cal.), 39 Pac. 209; Barnebee v. Hunstock, 29 Cal. App. Dec. 551, 183 Pac. 951; Ulm v. Prather, 29 Cal. App. 92, 154 Pac. 611.

9. Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526.

10. Howell v. Howell, 101 Cal. 115, 35 Pac. 443.

11. See supra, § 240.

12. See supra, § 241.

13. See supra, § 242.

14. See supra, § 244.

the giving of notice of appeal,[15] of the filing of an undertaking,[16] and of other record except the judgment-roll.[17] In connection with the preparation of the record by the original method, attention has been given to the effect of a failure to present the transcript in the required form,[18] a failure to certify or stipulate to the correctness of the transcript,[19] a failure to authenticate the papers used on the hearing below,[20] and a failure to serve the transcript on the adverse party.[1] In connection with the preparation of the record by the alternative method, notice has been given to the effect of a failure to notify the clerk to prepare the transcript as required by law,[2] various failures attending the preparation of the reporter's transcript,[3] insufficient certification of the record,[4] a failure to conform to the rules as to form and arrangement,[5] and a failure to print portions of the reporter's transcript in the briefs.[6] Attention has already been given to the effect of a failure to file the transcript in time,[7] and will later be given to the effect of a failure to assign errors.[8]

§ 382. Time for Raising Objection.—A rule of the supreme court reads as follows:

"Exceptions or objections to the transcript, statement, the notice of appeal, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant, in writing, at least five days before the hearing, or they will not be regarded; and when so noted it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter,

15. See supra, § 246.
16. See supra, § 247.
17. See supra, § 259 et seq.
18. See supra, § 317 et seq.
19. See supra, § 321 et seq.
20. See supra, § 325.
1. See supra, § 333.
2. See supra, §§ 340, 345.
3. See supra, § 342 et seq.
4. See supra, §§ 350, 351.
5. See supra, § 356.
6. See supra, §§ 361, 363.
7. See supra, § 375.
8. See infra, § 408.

if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail."[9]

The object of this rule is to enable the appellant to remedy any defect or omission of the transcript for the purpose of enabling him to present his appeal upon the merits, and is to be liberally construed for that purpose.[10] If the respondent does not take his objection in time, it will not be noticed,[11] and will be deemed to have been waived.[12] If he does take his objection in time, the appellant may remove its grounds by correcting the defect.[13] If he does not do so, he must take the risk of having his appeal dismissed.[14]

The rule under discussion does not apply to an objection based on an omission which cannot be remedied by the appellant,[15] nor to an objection which goes directly to the appellate court's objection to hear the appeal.[16] Even where the rule applies, a formal notice of objection is unnecessary, and the objection may therefore be made in the respondent's brief if this is done within the time required by the rule.[17]

9. Rule XV of the supreme court: 177 Cal. xliii, 176 Pac. vii. Except for changes in terms due to varying rules as to what constitutes the record, this same principle appears as rule XV in 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii; and as rule XIII in 64 Cal. 635, and 52 Cal. 677. At one time the rule required the objection to be made in the respondent's brief: Rule XIII, 41 Cal. 695; 37 Cal. 705; and at another time at the first term after the transcript was filed and at least one day before the argument: Rule XIII, 28 Cal. 686; 26 Cal. 693; 11 Cal. 408.

10. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Poole v. Grand Circle, W. O. W., 17 Cal. App. 229, 119 Pac. 201.

11. Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511; Ross v. Roadhouse, 36 Cal. 580.

12. See infra, § 383.

13. See infra, § 384.

14. Hellings v. Duval, 119 Cal. 199, 51 Pac. 335.

15. Rogers v. Parish, 35 Cal. 127, failure to prepare statement.

16. In re Castle Dome Min. etc. Co., 79 Cal. 246, 21 Pac. 746 (failure to serve notice of appeal).

17. San Francisco etc. R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517.

§ 383. Waiver of Objection.—If the respondent does not raise an objection to the record, within the time required by the rule of court previously quoted,[18] he will be deemed to have waived it.[19] In this way respondents have been held to have waived objections based on the failure of the appellant to authenticate the affidavits used below,[20] to show when the original proposed statement was filed,[1] and to number the folios of the transcript.[2] So, also, it has been held that an objection that the transcript does not contain the whole record should be made before the submission of the cause,[3] so that the appellant may have an opportunity of supplying the missing papers,[4] or it will not be noticed.[5]

There is no waiver, however, of an objection based on an omission which cannot be remedied by the appellant, such as the failure to prepare a statement in the court below;[6] nor of an objection which goes directly to the jurisdiction of the appellate court, such as the failure to serve the notice of appeal.[7] So, also, an objection that the transcript does not bring up enough of the record to show error is not a mere technical objection to the transcript and is not waived by failing to take an exception thereto.[8]

18. See supra, § 382.

19. Robertson v. Williams, 81 Cal. 268, 22 Pac. 665; Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511; Ross v. Roadhouse, 36 Cal. 580; Rogers v. Parish, 35 Cal. 127; St. John v. Kidd, 26 Cal. 263; Bennett v. His Creditors, 22 Cal. 38.

20. Rogers v. Parish, 35 Cal. 127.

1. Ross v. Roadhouse, 36 Cal. 580.

2. Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511.

3. Hellings v. Duval, 119 Cal. 199, 51 Pac. 335 (omission of parts of judgment-roll); Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Ross v. Roadhouse, 36 Cal. 580 (failure to show when original proposed statement was filed); Solomon v. Reese, 34 Cal. 28; Bennett v. His Creditors, 22 Cal. 38.

4. Hellings v. Duval, 119 Cal. 199, 51 Pac. 335; Solomon v. Reese, 34 Cal. 28.

5. Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511; Ross v. Roadhouse, 36 Cal. 580.

6. Rogers v. Parish, 35 Cal. 127.

7. In re Castle Dome Min. etc. Co., 79 Cal. 246, 21 Pac. 746.

8. Todd v. Winants, 36 Cal. 129.

§ 384. Removal of Ground of Objection.—The purpose of the court rule requiring the respondent to object to the record at least five days before the hearing is to enable the appellant to remedy the defects or omissions of the transcript, so that he may present his appeal upon its merits.[9] Accordingly, the ground of such an objection is removed if the appellant files a proper record before the hearing.[10] It is true that the code provides that "if the appellant fails to furnish the necessary papers, the appeal may be dismissed,"[11] but this is to be read in connection with court rules allowing the correction of defects and providing for seasonable objection thereto.[12] So construed, this does not authorize a dismissal upon the mere showing that the transcript as filed is defective, but merely authorizes a dismissal if the appellant fails to furnish the requisite papers after the diminution of the record has been suggested.[13]

The rule that the appellant, by correcting the record before the hearing, may remove the ground of the respondent's objection, has been applied where the transcript before correction did not contain a copy of the judgment-roll,[14] a copy of the notice of appeal,[15] a showing of service thereof,[16] a copy of the undertaking on appeal,[17]

9. See supra, § 382.

10. Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214; Hellings v. Duval, 119 Cal. 199, 51 Pac. 335; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103; Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686; Poole v. Grand Circle, W. O. W., 17 Cal. App. 229, 119 Pac. 201; People v. Jacobs, 2 Cal. Unrep. 672, 12 Pac. 222.

11. Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103, quoting Code Civ. Proc., § 954, and putting the word "may" in italics.

12. Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103, citing rules XIV and XV of the supreme court.

13. Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103, citing rules XIV and XV of the supreme court.

14. Hellings v. Duval, 119 Cal. 199, 51 Pac. 335; Poole v. Grand Circle, W. O. W., 17 Cal. App. 229, 119 Pac. 201.

15. Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103.

16. Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109; Moore v. Besse, 35 Cal. 183.

17. Swasey v. Adair, 83 Cal. 136, 23 Pac. 284.

and where it did not show that the personal representative of a party had been substituted,[18] where it was not certified as correct,[19] and where notice to the clerk to prepare the transcript under the alternative method was not given in time.[20] It has been applied also where the transcript was not filed in time,[1] but this application seems incorrect.[2]

Amendments and Corrections.

§ 385. Diminution of Record Generally.—A rule of the supreme court provides as follows:

"For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon notice and good cause shown, obtain such order as may be proper."[3]

In connection with this rule, it must be remembered that it is the court below,[4] and not the appellate court,[5] which has authority to amend the record itself, although the appellate court may correct the transcript in order to

18. Pacific Pav. Co. v. Bolton, 97 Cal. 8, 33 Am. St. Rep. 157, 31 Pac. 625.

19. Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214; Hellings v. Duval, 119 Cal. 199, 51 Pac. 335 (where the original certificate was informal); Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; People v. Jacobs, 2 Cal. Unrep. 672, 12 Pac. 222 (where the original certificate was insufficient).

20. Pioneer Truck Co. v. Hawley, 39 Cal. App. 481, 179 Pac. 447.

1. Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686.

2. A motion to dismiss an appeal on the ground that the transcript was not filed in time is based on rule V of the supreme court, and not on rule XV. It is answered by the filing of the transcript before notice of the motion to dismiss, but is not answered by filing after such notice but before the hearing.

3. Rule XIV of the supreme court: 177 Cal. xliii, 176 Pac. vii. For earlier statements of this same principle, see rule XIV as stated in 160 Cal. xli, 119 Pac. ix; 144 Cal. xxxix, 79 Pac. vii; 130 Cal. xxxv, 64 Pac. vii; and rule XII as stated in 64 Cal. 635; 52 Cal. 677; 41 Cal. 695; 37 Cal. 705; 28 Cal. 686; 26 Cal. 693; 11 Cal. 408.

As to suggestion of diminution of record by amicus curiae, see AMICUS CURIAE, vol. 1, p. 1094.

4. See infra, § 386.

5. See infra, § 387.

make it correspond to the record.[6] Consequently, an appellant cannot file, upon a suggestion of a diminution of the record, orders of the lower court which do not form any part of the record on the appeal;[7] nor request a supplement transcript containing matters which have not been made a part of the record.[8] He may, however, have portions of the record, omitted from the transcript, brought up.[9]

In general, the court should be liberal in granting amendments which can cause the respondent no injustice and which will secure to the appellant a hearing on the merits.[10] After a case is on the calendar and has been submitted for decision, however, it requires a very strong showing to justify the court in allowing the transcript to be materially changed by supplying papers which have been deliberately omitted.[11]

It is the duty of counsel to have material clerical and typographical errors in the transcript corrected, and they must see to it that the corrections are made in all the copies filed with the clerk.[12] And after an order has been issued directing the clerk to certify up a portion of the record omitted, it is the duty of the appellant to see that the order is complied with.[13] Amendments to the record should be incorporated in their proper place in the original document.[14]

6. See infra, § 388.

7. Ingerman v. Moore, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306.

8. Espinosa v. Gould, 32 Cal. App. Dec. 152, 190 Pac. 481. "This rule is not intended to relieve those who, through ignorance, negligence, or mistake, have failed to procure from the trial judge a full and correct statement of the case." Fagan v. Carty, 77 Cal. 352, 19 Pac. 584, referring to rule XII, now rule XIV.

9. Estate of Clanton, 171 Cal. 381, 153 Pac. 459; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Kimball v. Semple, 31 Cal. 657. An error in an indorsement as to the date of filing a paper may be corrected by the record. Smith v. His Creditors, 59 Cal. 267.

10. Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109.

11. Ketchum v. Crippen, 31 Cal. 365.

12. Vassault v. Edwards, 43 Cal. 458.

13. Kimball v. Semple, 31 Cal. 657.

14. See supra, § 320.

§ 386. Amendment by Trial Court.—The taking of an appeal does not suspend or impair the power of the lower court over its own records,[15] or vest such power in the appellate court.[16] Consequently, if there is any error in the record on appeal, the application to correct it must be made to the court in the record of which the error exists,[17] for that is the court which has power to alter it so as to make it speak the truth.[18] For instance, if part of the record has been lost, application to correct the defect should be made in the court below.[19] The proper procedure in such case is for the lower court to direct that proved copies be substituted for the lost papers and that they shall constitute the record lost. It should not direct that the copies shall be used on appeal, for the law designates what shall constitute such record.[20] Thus, where the original copy of the summons, or of the notice of appeal, has been lost, a showing may be made in the lower court that it was duly served. Upon an order below that a copy, with an affidavit showing its service, be filed nunc pro tunc, the substituted papers are entitled to the same weight as are the originals.[1] Similarly, if the record on appeal does not contain any such order as that appealed from, the appellant may, with leave of the appellate court, have the order, entered nunc pro tunc and certified up.[2] Under the procedure in California the power of the court to amend its record is derived from section 473 of the Code of Civil Procedure, and must be

15. People v. Murback, 64 Cal. 369, 30 Pac. 608; Buckman v. Whitney, 24 Cal. 267.

16. See infra, § 387.

17. Boyd v. Burrel, 60 Cal. 280; Sheldon v. Gunn, 57 Cal. 40; Boston v. Haynes, 31 Cal. 107.

18. Sheldon v. Gunn, 57 Cal. 40; Boyd v. Burrel, 60 Cal. 280.

19. Buckman v. Whitney, 28 Cal. 555; Buckman v. Whitney, 24 Cal. 267.

20. Buckman v. Whitney, 28 Cal. 555.

1. Hibernia Sav. & Loan Soc. v. Matthai, 116 Cal. 424, 48 Pac. 370 (summons); Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580 (notice of appeal).

2. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

exercised within the six months' period limited thereby.[3] It has been assumed, though not decided, that an order refusing to change the records is appealable,[4] but it has been said that the acts of the court in exercising its inherent power to amend its record, or to supply a lost record, will be presumed to have been properly exercised.[5]

§ 387. Amendment by Appellate Court.—The rule is well settled that it is no part of the province of the appellate courts to amend the records of the court below,[6] although it may correct the transcript on appeal in order to make it correspond to the actual record.[7] As the reason for this rule, it has been said that the record in the appellate court is a transcript of the record of the court below, and that the appellate court has no authority to say what this record is or shall be.[8] Furthermore, it would be a departure from all principle to allow a record sent to the appellate court to be assailed by evidence of less dignity than a record.[9] Consequently, the appellate court can only act upon the transcript of the record as it exists in the lower court, duly authenticated in the mode prescribed by law.[10]

Pursuant to this rule, the appellate court cannot make an order to supply a lost record,[11] nor allow a showing

3. Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590.

4. Estate of Fisher, 75 Cal. 523, 17 Pac. 640, holding that no error is shown where the affidavit of the clerk and the attorney for the appellants conflict.

5. Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

6. Clare v. Sacramento Electric etc. Co., 122 Cal. 504, 55 Pac. 326; Boyd v. Burrel, 60 Cal. 280; Satterlee v. Bliss, 36 Cal. 489 (where Sawyer, C. J., states the rule quoted in the text); Boston v. Haynes, 31 Cal. 107; Bonds v. Hickman, 29 Cal. 460; Buckman v. Whitney, 28 Cal. 555; Buckman v. Whitney, 24 Cal. 267; Mendocino County v. Peters, 2 Cal. App. 24, 82 Pac. 1122.

7. See infra, § 388.

8. Satterlee v. Bliss, 36 Cal. 489, per Sawyer, C. J.; Boston v. Haynes, 31 Cal. 107.

9. Boyd v. Burrel, 60 Cal. 280.

10. Thompson v. Patterson, 54 Cal. 542 (citing earlier California cases to the same effect); Satterlee v. Bliss, 36 Cal. 489.

11. Buckman v. Whitney, 28 Cal. 555; Buckman v. Whitney, 24 Cal. 267.

that the notice of appeal was served on a date different from that stated in the transcript.[12] Neither can the appellate court make changes in the bill of exceptions settled below,[13] nor, under the former practice, in the statement on appeal,[14] or in the statement on motion for new trial.[15]

§ 388. Correction of Transcript by Appellate Court.— While the appellate court has no authority to vary or amend the record itself,[16] it may order a document to be inserted in or stricken from the transcript in order to perfect it.[17] Thus, the appellate court may grant a motion of the appellant to allow him to complete the record by supplying a properly certified copy of the notice of appeal;[18] a sufficient affidavit of the service thereof;[19] or a copy of the undertaking on appeal.[20] Furthermore, the appellate court may correct the judgment copied into the transcript in order to make it correspond to the judgment in fact rendered by the trial court;[1] may supply omissions in an incomplete copy of a bill of exceptions to make it correspond to the bill actually settled by the trial judge;[2] and may, despite a stipulation that the transcript is correct, complete the judgment-roll by adding thereto special verdicts omitted in the transcript.[3]

12. Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Boyd v. Burrel, 60 Cal. 280; Boston v. Haynes, 31 Cal. 107; Smith v. Brannan, 13 Cal. 107.

13. See supra, § 279.

14. Fagan v. Carty, 77 Cal. 352, 19 Pac. 584.

15. Clare v. Sacramento Electric etc. Co., 122 Cal. 504, 55 Pac. 326; City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562; Wormouth v. Gardner, 35 Cal. 227.

16. See supra, § 387.

17. Bonds v. Hickman, 29 Cal. 460. See, however, the cases cited infra, this section, as to striking out a part of the transcript.

18. Hill v. Finnigan, 54 Cal. 311; Swortfiguer v. White, 6 Cal. Unrep. 778, 66 Pac. 80; Id., 6 Cal. Unrep. 779, 66 Pac. 81.

19. Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109; Moore v. Besse, 35 Cal. 183.

20. Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Hill v. Finnigan, 54 Cal. 311.

1. Worcester v. Kitts, 8 Cal. App. 181, 96 Pac. 335.

2. Flannigan v. Towle, 8 Cal. App. 229, 96 Pac. 507.

3. California Wine Assn. v. Commercial Union F. Ins. Co., 159 Cal. 49, 112 Pac. 858.

It is not the proper practice, however, to move in the appellate court to strike out portions of the transcript on the ground that they are no part of the record,[4] for the appellate court cannot well entertain and consider motions of this character in advance of a hearing of the appeal upon its merits.[5] If the matters objected to form no part of the record, they will not be considered by the appellate court in determining the appeal.[6]

Correction of copies.—It is the duty of counsel to see that the copies of the transcript intended for members of the court literally conform to the transcript filed in the office of the clerk.[7] If corrections are made, they should be made in all of the copies,[8] for in the great majority of cases the appellate judges never see the transcript filed in the clerk's office, but depend entirely upon the copies sent to the consultation room for the use of members of the court.[9]

§ 389. Original Writs to Bring Up Record.—In several cases the California courts have considered the availability of original writs to bring up the record. Where the action of the lower court is founded upon a judgment in an earlier case, they have held that the record of the court in the earlier case may be brought up by certiorari. It need not be included in a bill of exceptions, for it is already a part of the record below,[10] and the only purpose of a bill of exceptions is to make a record of that which without it is not a record.[11] Furthermore, mandamus is available, as earlier sections of this article have pointed

4. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Sutton v. Symons, 97 Cal. 475, 32 Pac. 588; In re Wells, 35 Cal. App. 802, 171 Pac. 110.

5. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280.

6. Brode v. Goslin, 158 Cal. 699, 112 Pac. 280; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Sutton v. Symons, 97 Cal. 475, 32 Pac. 588.

7. Rousset v. Boyle, 45 Cal. 64; Franklin v. Goodman, 31 Cal. 458.

8. Vassault v. Edwards, 43 Cal. 458.

9. Rousset v. Boyle, 45 Cal. 64; Franklin v. Goodman, 31 Cal. 458.

10. Parsons v. Davis, 3 Cal. 421.

11. See supra, §§ 266, 268.

out, to compel the trial judge to settle a bill of exceptions,[12] or to authenticate a reporter's transcript.[13] In general, it seems that a court which has appellate jurisdiction and authority to issue necessary writs may frame and issue an appropriate writ for the purpose of bringing up a record from an inferior court to enable it to review alleged errors.[14]

Mandamus will not lie, however, to compel the clerk of the court below to certify to the correctness of the transcript, for the appellant has an adequate remedy in a motion in the court below to compel such certification.[15] Furthermore, a writ of review will not be granted to compel the trial judge to authenticate certain papers, for the judge does not exceed his jurisdiction if he omits matters from the transcript.[16]

Conclusiveness and Impeachment.

§ 390. **Conclusiveness Generally.**—The presumption of verity which attaches to the record of a domestic judgment is the same upon appeal therefrom as upon collateral attack; except that upon a direct attack, there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant, and the defendant may, by bill of exceptions, present evidence outside of the record for the purpose of showing that the court did not have such jurisdiction. In both cases the record is conclusive as to all matters as to which it speaks unless properly impeached.[17] Where the appellant brings up the amended complaint as a part of the record and as one of the papers on file in the cause, he is

12. See supra, § 296 et seq.

13. See supra, § 352.

14. Ex parte Thistleton, 52 Cal. 220.

15. People v. Bartlett, 40 Cal. 142. The appellate court may, however, order an insufficient certificate corrected. See supra, §§ 321, 322.

16. Lapique v. Superior Court, 18 Cal. App. 50, 122 Pac. 80.

17. Sichler v. Look, 93 Cal. 600, 29 Pac. 220, per Harrison, J.

estopped to deny that it has been duly filed.[18] Where the record does not disclose that an instruction was given, the appellate court is bound thereby and must hold that the omission occurred.[19] Attention has already been directed to the rule that a settled bill of exceptions is conclusive,[20] and to the rule that the record of the court below cannot be amended by the appellate tribunal.[1]

Clerk's certificate to transcript.—It has been repeatedly decided that the appellate court is not bound by the certificate of the clerk as to the correctness of a record.[2] The law does not impose upon the clerk the duty of certifying to the identity of the papers used at the hearing below,[3] and his certificate to that effect is therefore not determinative as against his subsequent statement that he signed by mistake and without knowledge of the facts.[4] As against the certificate of the clerk, however, the mere statement of counsel that errors exist in the transcript does not establish that fact.[5]

§ 391. Conclusiveness of Recitals.—Recitals which are properly in a judgment, although not necessary to its validity, are conclusive evidence of the action of the court below, in the absence of a bill of exceptions.[6] Thus, where the judgment recites that the defendant was "duly and regularly summoned," it will be presumed upon direct appeal, in the absence of evidence to the contrary, that summons by publication was made under proper order and sufficient affidavit, notwithstanding an order of publication tending to show otherwise.[7] Similarly,

18. Mahlstadt v. Blanc, 34 Cal. 577.

19. In re Ross' Estate, 179 Cal. 629, 178 Pac. 510.

20. See supra, § 279.

1. See supra, § 387.

2. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

3. See supra, § 329.

4. Baker v. Snyder, 58 Cal. 617.

5. Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

6. Derby & Co. v. Jackman, 89 Cal. 1, 26 Pac. 610; Hibernia Sav. & Loan Soc. v. Russell, 6 Cal. Unrep. 404, 60 Pac. 40.

7. Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

where the judgment recites that certain parties appeared, this recital is conclusive on the appellate court, particularly when there is nothing in the record to the contrary.[8]

A recital in the order appealed from that the matter "came on regularly for hearing this day" must be presumed to be true, in the absence of anything in the record to the contrary;[9] and recitals of the transcript must be taken as conclusive as to the time when a motion was submitted.[10] So, in the absence of an affirmative showing to the contrary, the recitals of an amended answer, being a part of the judgment-roll, must be accepted as verity.[11] But a recital in the findings that there was a waiver of jury trial cannot prevail against a showing in a bill of exceptions that a jury was demanded and denied.[12]

§ 392. Impeachment of Record.—Affidavits cannot be used to attack any portions of the transcript,[13] and therefore cannot be used to show that the notice of appeal was filed on a different day than that set out by the record.[14] Where the record indicates the proper order of proceedings, it is doubtful whether affidavits can be received to show a different order.[15]

The certificate of the clerk of the court below cannot be received to contradict the plain import of the judgment itself.[16] Similarly, where the record shows that the judgment or order appealed from was rendered on a certain date, and the parties have stipulated that the transcript is correct, entry at a different date cannot be shown by

8. Estate of Pendergast, 143 Cal. 135, 76 Pac. 962; Brown v. Caldwell, 13 Cal. App. 29, 108 Pac. 874.

9. Estate of Schulmeyer, 171 Cal. 340, 153 Pac. 233.

10. Lowenberg v. L. Jacobson's Sons, 25 Cal. App. 790, 145 Pac. 734.

11. Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690.

12. Downing v. Le Du, 82 Cal. 471, 23 Pac. 202.

13. Bonds v. Hickman, 29 Cal. 460.

14. Boston v. Haynes, 31 Cal. 107; Bonds v. Hickman, 29 Cal. 460.

15. Wright v. Ross, 26 Cal. 262 (order of service and filing notice of appeal).

16. Belt v. Davis, 1 Cal. 134.

a certificate of the clerk below,[17] or by a memorandum in the minute-book made by a copyist.[18]

Under the rule that a motion to dismiss an appeal for failure to file the transcript must be heard on the certificate of the clerk,[19] it has been held that an affidavit cannot be considered for the purpose of determining the character of the records kept by the clerk, or from what order the appeal was taken.[20]

X. Questions Presented for Review.

In General.

§ 393. General Rule.—It is a general rule that matters which are not a part of the record cannot be considered on appeal,[1] even though included in the transcript,[2] or though presented by the record in another appeal.[3] To enable the appellate court to review the action of the court below, the record must show precisely what action was invoked in that court and the precise ruling that was made therein.[4] There is no authority or principle which will justify a court of appeal in going beyond the scope

17. Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888.

18. Estate of Pichoir, 139 Cal. 694, 70 Pac. 214, 73 Pac. 604.

19. See supra, § 376.

20. Chevassus v. Burr, 134 Cal. 434, 66 Pac. 568.

1. Stoff v. Erken, 172 Cal. 481, 156 Pac. 1033; Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; Estate of Angle, 148 Cal. 102, 82 Pac. 668; Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860; Rogers v. Tennant, 45 Cal. 184; Morris v. Iden, 23 Cal. App. 388, 138 Pac. 120; Carstenbrook v. Wedderien, 7 Cal. App. 465, 94 Pac. 372; Bryant v. Hawley, 7 Cal. Unrep. 342, 94 Pac. 850; Tibbetts v. City of San Francisco, 1 Cal. Unrep. 23. And see the cases cited infra, § 394, applying this rule.

2. Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Cormond v. United Railroads of San Francisco, 41 Cal. App. 683, 183 Pac. 218; McVay v. Central California Inv. Co., 6 Cal. App. 184, 91 Pac. 745.

3. Bonney v. Tilley, 123 Cal. 126, 55 Pac. 801; Rogers v. Tennant, 45 Cal. 184; Davidson v. Roffy, 28 Cal. App. Dec. 525, 819, 180 Pac. 830.

4. Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

of an order or judgment from which an appeal is taken and reviewing matters as to which there is absolute silence in the record,[5] for an appellate court is not at liberty to interpolate into the record any matter which did not form an element in the case as it was presented below.[6] Error must be shown affirmatively by the record,[7] for every presumption is in favor of the action of the court below.[8] If the record brought up on appeal does not disclose the error relied on, there is nothing for the appellate court to examine,[9] and the judgment appealed from should therefore be affirmed.[10]

§ 394. Application of Rule.—The rule that matters not contained in the record will not be considered on appeal has been applied to many matters, such as affidavits,[11] bills of lading,[12] maps,[13] rules of the lower court,[14] statements of counsel in their briefs,[15] unauthenticated instructions of the trial court,[16] matters set forth only in the specification of error,[17] copies of a notice of intention to move for a new trial,[18] and papers used below but not certified by the trial judge.[19] A judgment-roll which is not in the record may not be considered, though the court is acquainted with its contents.[20] Similarly, matters of

5. Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364.

6. Rogers v. Tennant, 45 Cal. 184.

7. See supra, § 239.

8. See infra, § 499.

9. Todd v. Winants, 36 Cal. 129.

10. Clarke v. Baird, 4 Cal. Unrep. 339, 34 Pac. 777; Martin v. Splivalo, 3 Cal. Unrep. 83, 21 Pac. 547.

11. People v. Gay, 141 Cal. 41, 74 Pac. 443.

12. Pioneer Fruit Co. v. Southern Pacific Co., 31 Cal. App. Dec. 1003, 190 Pac. 50.

13. Gallatin v. Corning Irr. Co., 163 Cal. 405, Ann. Cas. 1914A, 74, 126 Pac. 864.

14. Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870.

15. Rich v. Moss Beach Realty Co., 30 Cal. App. Dec. 301, 185 Pac. 859; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719.

16. McVay v. Central Cal. Inv. Co., 6 Cal. App. 184, 91 Pac. 745.

17. See supra, § 238.

18. Cormond v. United Railroads of San Francisco, 41 Cal. App. 683, 183 Pac. 218.

19. See supra, § 325.

20. Reed v. Cross, 116 Cal. 473, 48 Pac. 491.

equitable cognizance which are outside the record, do not justify a rehearing on appeal, although of persuasive force.[1]

Opinion of lower court.—The opinion of the lower court is not a part of the record on appeal,[2] and consequently cannot be reviewed or considered on appeal,[3] even where it is incorporated in a bill of exceptions.[4] Thus it cannot be used on appeal to supply findings to support either findings or judgment,[5] nor to limit an order actually made.[6]

Limitations on rule.—The rule that a court will consider on a pending appeal only matters contained in the record is not inflexible nor of universal application. Matters often arise subsequent to the appeal which may be brought before the appellate court on evidence outside the record, and which will be considered and acted on in disposing of the appeal. Such matters may be the granting of a new trial; the occurrence of a fact creating a moot question; the repeal of a penal statute; the abolition of the jurisdiction of the appellate court; or the determination of a similar case.[7] Furthermore, even matters which are not a part of the record have been considered as against

1. Carstenbrook v. Wedderien, 7 Cal. App. 465, 94 Pac. 372.

2. See supra, § 235.

3. Goldner v. Spencer, 163 Cal. 317, 125 Pac. 347; Sunrise Land Co. v. Root, 160 Cal. 95, 116 Pac. 72; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; People v. Flood, 102 Cal. 330, 36 Pac. 663; Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861; Wickersham Co. v. Nichols, 22 Cal. App. 731, 136 Pac. 511; Spencer v. McCament, 7 Cal. App. 84, 93 Pac. 682; Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Hewlett v. Steele, 2 Cal. Unrep. 157. See, however, Estate of Cahill, 74 Cal. 52, 15 Pac. 364, where the court considered the opinion of the court against counsel who printed it in his brief.

4. Goldner v. Spencer, 163 Cal. 317, 125 Pac. 347; People v. Flood, 102 Cal. 330, 36 Pac. 663.

5. People v. Quong Sing, 20 Cal. App. 26, 127 Pac. 1052.

6. Classen v. Thomas, 164 Cal. 196, 128 Pac. 329; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Newman v. Overland etc. R. Co., 132 Cal. 73, 64 Pac. 110.

7. Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 Pac. 704, per Lorigan, J.

counsel who have printed them in their briefs,[8] and the uncontradicted statements of counsel may be referred to as showing that an inference is not unfounded.[9]

§ 395. Record Omitting Evidence.—In general, it may be said that evidence which was introduced below will not be considered on appeal unless it is incorporated in the record.[10] If the evidence is not set forth in the record, the appellate court will not consider an objection that the lower court failed to make a finding upon a material issue;[11] nor will it review the principles upon which a commissioner was ordered to state an account.[12] Where the evidence is not included in the record, the findings, including the special findings of the jury,[13] are conclusive,[14] for there is nothing to enable the appellate court

8. Estate of Cahill, 74 Cal. 52, 15 Pac. 364; Mott v. De Reyes, 45 Cal. 379.

9. Hood v. Hamilton, 33 Cal. 698.

10. United Land Assn. v. Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064; Goodhue v. Rice, 53 Cal. 302.

11. Mohr v. North Rawhide Min. etc. Co., 177 Cal. 264, 170 Pac. 600; Coats v. Coats, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441; Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Eva v. Symons, 145 Cal. 202, 78 Pac. 648; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 Pac. 422; Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113; Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848; Southern Pacific R. Co. v. Dufour, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098 (the leading case); Parker v. Power, 28 Cal. App. 332, 152 Pac. 935; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719; Downing v. Donegan, 1 Cal. App. 710, 82 Pac. 1111; Newman v. Maldonado, 3 Cal. Unrep. 540, 30 Pac. 833. See infra, § 614. as to rule that failure to find is not reversible error unless evidence is given on the issue.

12. Fulton v. Cox, 40 Cal. 101.

13. Nahhas v. Browning, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442.

14. Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416; Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105; Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936; Pacific Paving Co. v. Mowbray, 127 Cal. 1, 59 Pac. 205; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Merithew v. Orr, 90 Cal. 363, 27 Pac. 295; Brett v. Vanomar Producers, 31 Cal. App. Dec. 33, 187 Pac. 758; Spotton v. Dyer, 29 Cal. App. Dec. 503, 506, 184 Pac. 23;

to pass upon the sufficiency of the evidence.[15] If the transcript is silent as to the evidence introduced, the appellant cannot raise the question that a judgment pleaded by the other party as an estoppel was not an estoppel at law.[16] Where the statement on motion for new trial and the transcript are mere skeletons, omitting sundry papers purporting to have been put in evidence, the appellate court cannot undertake to examine the questions which the appeal was intended to present.[17] Unless the evidence is in the record, the appellate court will not review a refusal to grant a trial in forma pauperis,[18] a nonsuit or directed verdict,[19] the sufficiency of the evidence,[20] or instructions given or refused.[1] Where the allegations of the complaint are not denied in the answer, however, the question whether the judgment was for too great a sum arises without bringing up the evidence.[2]

§ 396. Appeal on Judgment-roll.—Unless additional matter is brought into the record by a bill of exceptions,[3] or a reporter's transcript,[4] or, under the former practice, by a statement on motion for new trial,[5] or a statement on appeal,[6] the appellate court is limited in its determination to the questions presented by the judgment-roll.[7] In

Vance Redwood Lumber Co. v. Durphy, 8 Cal. App. 664, 97 Pac. 702. See, also, supra, § 167, on appeal on judgment-roll alone.

15. Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717. See, also, infra, § 401, as to presentation of question as to sufficiency of evidence.

16. Spanagel v. Reay, 47 Cal. 608.

17. Bush v. Taylor, 45 Cal. 112.

18. Nadeau v. Lynch, 41 Cal. App. 755, 183 Pac. 278.

19. Runyon v. City of Los Angeles, 40 Cal. App. 383, 180 Pac. 837.

20. See infra, § 401.

1. See infra, § 402.

2. Patterson v. Sharp, 41 Cal. 133.

3. See supra, § 232.

4. See supra, § 284.

5. See supra, § 236.

6. See supra, § 237.

7. Estate of Gamble, 166 Cal. 253, 135 Pac. 970; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; McIntyre v. Willis, 20 Cal. 177; Hayser v. Minor, 27 Cal. 107; McGill v. Rainaldi, 11 Cal. 391; American River Water etc. Co. v. Bear River Water etc. Co., 11 Cal. 339; Dietz v. Scott, 27 Cal. App. 320, 149 Pac. 775; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719; Wetherbee v. Davis, 1 Cal. Unrep. 403.

such case the only question presented for review is whether or not the findings support the judgment;[8] or, more accurately, the only questions to be considered are: (1) Did the complaint state facts sufficient to constitute a cause of action? (2) Are the findings within the issues? (3) Is the judgment supported by the findings? and (4) Does reversible error appear on the face of the record?[9]

No question arises as to the sufficiency of the evidence to support the findings,[10] or a nonsuit,[11] or rulings made during the taking of evidence.[12] The appellate court cannot in such case consider the pendency of another action based on the same cause of action.[13] The findings made are conclusive,[14] unless contradicted by other findings,[15]

8. Ivancovich v. Weilenman, 144 Cal. 757, 78 Pac. 268. In other words, the court is limited to a consideration of the facts presented by the findings and admitted by the pleadings. MacFarland v. Walker, 40 Cal. App. 508, 181 Pac. 248.

9. Norton v. Newerf, 30 Cal. App. Dec. 886, 187 Pac. 57.

10. Archer v. Harvey, 164 Cal. 274, 128 Pac. 410; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Miller & Lux v. Enterprise Canal etc. Co., 145 Cal. 652, 79 Pac. 439; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; In re Graham's Estate, 29 Cal. App. Dec. 545, 183 Pac. 952; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Brown v. Grand Lodge, A. O. U. W., 13 Cal. App. 537, 110 Pac. 351; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719; Janes v. De Azevedo, 3 Cal. Unrep. 556, 30 Pac. 1104. See, also, supra, § 166 (record omitting evidence), and infra, § 401 (presentation of question as to sufficiency of evidence).

11. Nicholl v. Littlefield, 60 Cal. 238.

12. Miller & Lux v. Enterprise Canal etc. Co., 145 Cal. 652, 79 Pac. 439.

13. Union Trust Co. v. Ensign Baker R. Co., 29 Cal. App. 641, 157 Pac. 613. See ABATEMENT and REVIVAL, vol. 1, p. 24.

14. Archer v. Harvey, 164 Cal. 274, 128 Pac. 410; Miller & Lux v. Enterprise Canal etc. Co., 145 Cal. 652, 79 Pac. 439; Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936; Klein v. Lewis, 41 Cal. App. 463, 182 Pac. 789; Bradley Bros. v. Bradley, 20 Cal. App. 1, 127 Pac. 1044; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672. See, also, supra, § 166, as to conclusiveness of findings where record does not contain the evidence.

15. Miller & Lux v. Enterprise Canal etc. Co., 145 Cal. 652, 79 Pac. 439.

or unless obviously outside of the issues;[16] and the appellate court cannot consider the omission to make findings.[17]

Particular Questions.

§ 397. Interlocutory Orders.—The rule that matters not appearing in the record cannot be considered on appeal has often been applied in the case of interlocutory orders.[18] Thus, it is the rule that an order granting a writ of attachment,[19] an order refusing to permit the jury to view the premises,[20] and a restraining order and proceedings in connection therewith,[1] cannot be considered unless the record shows that the order in question was granted. Furthermore, it has been held that an order denying a motion to dissolve an attachment,[2] an order denying a motion for a nonsuit,[3] and an order directing a receiver to pay funds in his hands into court,[4] cannot be reviewed unless the record shows the grounds for the motion. Similarly, an order denying an application for a continuance will not be considered unless the affidavits on which the application was made are embodied in the record;[5] and the disposition of a motion for a change of venue cannot be considered unless the affidavits on which it is based are made a part of the record by proper authentication.[6] An order dissolving an injunction will not be reviewed where there is nothing in the record to show upon what the court

16. Bradley Bros. v. Bradley, 20 Cal. App. 1, 127 Pac. 1044.

17. Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936. See, also, supra, § 166.

18. See the cases cited infra, this section.

19. Fresno Planing Mill Co. v. Manning, 20 Cal. App. 766, 130 Pac. 196.

20. Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185.

1. Morris v. Iden, 23 Cal. App. 388, 138 Pac. 120.

2. Costa v. Raza, 23 Cal. App. 754, 139 Pac. 899.

3. People v. Banvard, 27 Cal. 470; McGarrity v. Byington, 12 Cal. 426; Johnson v. Center, 4 Cal. App. 616, 88 Pac. 727.

4. Coburn v. Ames, 80 Cal. 243, 22 Pac. 174.

5. Robles v. Robles, 1 Cal. Unrep. 58.

6. Hibbard v. Chipman, 1 Cal. Unrep. 16; Gliddon v. Kerry, 1 Cal. Unrep. 15.

acted,[7] and the sufficiency of a writ of attachment will not be considered if the writ is not set forth in the record.[8] Nevertheless, an order appointing a receiver may be reviewed in the absence of a bill of exceptions containing the evidence on which the court acted, if facts justifying the order are neither averred in the pleadings nor shown in the findings.[9]

§ 398. **Orders Relating to Pleadings.**—Orders relating to pleadings will not be reviewed on appeal unless the facts are presented in the record.[10] Thus, it has been held that unless the record shows that a demurrer was filed or acted upon, the appellate court will not consider alleged error in the fact that it was sustained,[11] or in the fact that it was overruled.[12] Unless the record shows that a demurrer was presented below, the appellate court will not review the lower court's failure to consider it.[13] Similarly, an order refusing to allow an amendment to a pleading cannot be considered if there is nothing in the record to show that any proposed amendment was served or presented,[14] or to show the nature of the proposed amendment.[15] Furthermore, an order sustaining a demurrer to a complaint, without leave to amend cannot be reviewed unless the record shows that the plaintiff

7. Fowler v. Heinrath, 2 Cal. Unrep. 249, 2 Pac. 248. See INJUNCTION.

8. Davis v. Baker, 88 Cal. 106, 25 Pac. 1108 (holding that it is insufficient to set forth a part of the writ in the objections of counsel). See ATTACHMENT.

9. People v. Union Bldg. & Loan Assn., 127 Cal. 400, 59 Pac. 692. See RECEIVERS.

10. See the cases cited infra, this section.

11. Clark v. Taylor, 91 Cal. 552, 27 Pac. 860.

12. Damsguard v. Gunnoldson, 2 Cal. Unrep. 512, 7 Pac. 772.

13. O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576.

14. Martin v. Thompson, 62 Cal. 619.

15. Worley v. Spreckels Bros. Commercial Co., 163 Cal. 60, 124 Pac. 697; Marsh v. Lott, 156 Cal. 643, 105 Pac. 968; Jessup v. King, 4 Cal. 331; Thompson v. Langton, 31 Cal. App. Dec. 139, 187 Pac. 970; Rogers Bros. Co. v. Beck, 29 Cal. App. Dec. 713, 184 Pac. 515; Calara Valley Realty Co. v. Smith, 29 Cal. App. 589, 156 Pac. 369.

asked leave to amend,[16] and indicates what change he proposed to make.[17] An order striking out a demurrer cannot be reviewed in the absence of a showing that the demurrer was well taken and would have been sustained if it had not been stricken out;[18] and an order striking out a portion of a complaint cannot be reviewed unless the record shows what portion was stricken.[19] To obtain a review of an order made upon a motion to dismiss a complaint, the record should show the papers read or evidence offered in its support.[20] Nevertheless, if it appears by bill of exceptions that an application to amend a complaint was denied on the ground that the complaint as amended would not state a cause of action, the proposed amendments should be considered on appeal in determining whether a cause of action was stated by the plaintiff in the lower court.[1]

§ 399. **Admission of Evidence.**—Error in admitting evidence cannot be considered on appeal unless matters relating thereto are contained in the record.[2] Thus, error in allowing a witness to read a contract cannot be considered where the record does not contain the contract, or a showing of its contents or materiality;[3] and error in admitting written instruments in evidence cannot be considered unless the record shows the purpose for which they were admitted, the grounds of the objection, and so much of the evidence as is necessary to indicate its per-

16. Carley v. Vallecita Mining Co., 16 Cal. App. 781, 117 Pac. 1037.

17. Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516.

18. Orange Growers' Bank v. Duncan, 133 Cal. 254, 65 Pac. 469.

19. Overton v. Noyes, 177 Cal. 450, 170 Pac. 1110.

20. Freeborn v. Glazer, 10 Cal. 337.

1. Campbell - Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184.

2. Estate of Ross, 171 Cal 64, 151 Pac. 1138; Estate of Young, 149 Cal. 173, 85 Pac. 145; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Moore v. Massini, 43 Cal. 389; Ehat v. Scheidt, 17 Cal. App. 430, 120 Pac. 49.

3. Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940.

tinence and materiality.[4] Error in admitting evidence of the location of school-land warrants on the ground that they were not recorded in the proper office cannot be considered on appeal unless the record shows that they were improperly recorded;[5] and error in admitting a deed, under the former rule requiring a seal, could not be considered unless the record showed that there was no seal when the instrument was made.[6] Similarly, objection that a verbal contract was admitted which should have been in writing cannot be considered where it does not appear which party introduced it or that either party objected to it.[7]

Error in admitting a judgment-roll, or in refusing to strike it out, cannot be considered where there is nothing in the record to show what the judgment-roll was;[8] and error in admitting a notice cannot be considered when the record does not contain the notice.[9] Indeed, it has been said, perhaps too broadly, that error in permitting testimony cannot be considered unless all of the evidence is in the record.[10] Certainly error in overruling an objection to a question asked a witness cannot be considered where the record fails to show that the witness answered the question;[11] or, where the question was asked on cross-examination, where the record does not show his testimony on direct examination.[12] Whether or not the answer of a witness was responsive cannot be considered if the question put does not appear in the record.[13]

4. Provost v. Piper, 9 Cal. 552. To the same general effect, see Bituminized Brick & Tile Co. v. Simons Brick Co., 60 Cal. Dec. 299, 192 Pac. 528.

5. Nims v. Johnson, 7 Cal. 110.

6. Clark v. Sawyer, 48 Cal. 133.

7. Dorris v. Sullivan, 89 Cal. 62, 26 Pac. 621.

8. Robinson v. Muir, 151 Cal. 118, 90 Pac. 521; Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413; Doyle v. Franklin, 48 Cal. 537.

9. McAdams v. Felkner, 140 Cal. 354, 73 Pac. 1064.

10. Brown v. Casey, 80 Cal. 504, 22 Pac. 257.

11. Perrin v. Carbone, 1 Cal. App. 295, 82 Pac. 222.

12. Watson v. Miller, 6 Cal. Unrep. 316, 58 Pac. 135.

13. Langenbeck v. Louis, 140 Cal. 406, 73 Pac. 1086; Buckman v.

§ 400. Exclusion of Evidence.—Where error consists in the exclusion of evidence, the error imputed must clearly appear.[14] In general, the court will not consider the exclusion of evidence unless it has before it, as a part of the record, the evidence proposed to be given and rejected,[15] or a showing of its materiality.[16] Thus, the exclusion of testimony will not be considered when there is nothing to show its purpose, materiality or relevancy,[17] or that it was in fact offered.[18] Error in sustaining an objection to a question asked a witness cannot be considered where there is nothing to show that the witness' answer would have been relevant and competent,[19] and error in striking out the answer of the witness on the ground that it was not responsive cannot be considered when the question asked is not made to appear.[20] To show error in rejecting a witness who is incompetent for most purposes, the record should show the specific purpose for which he was offered.[1]

Documentary evidence.—The rule that errors in excluding evidence will not be considered unless the evidence excluded, or a showing of its materiality, appears in the record, is especially true of writings offered in evidence, where, unless the offered papers are set forth or some statement is made as to their contents, it is impossible to

Whitney, 28 Cal. 555; Estate of Boyd, 25 Cal. 511.

14. Cohn v. Mulford, 15 Cal. 50.

15. Laux v. Bekins Van & Storage Co., 177 Cal. 63, 169 Pac. 1012; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224; Dwinelle v. Henriquez, 1 Cal. 387.

16. Estate of Angle, 148 Cal. 102, 82 Pac. 668; Crusoe v. Clark, 127 Cal. 341, 50 Pac. 700; Harper v. Anderson, 4 Cal. Unrep. 831, 37 Pac. 926.

17. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Taylor v. Kelley, 103 Cal. 178, 37 Pac. 216; Bornheimer v. Baldwin, 42 Cal. 27; Roberts v. Unger, 30 Cal. 676; Cohn v. Mulford, 15 Cal. 50.

18. Doak Gas Engine Co. v. Fraser, 168 Cal. 624, 143 Pac. 1024.

19. Callaway v. Wilson, 141 Cal. 421, 74 Pac. 1035.

20. Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298.

1. Sparks v. Kohler, 3 Cal. 299.

ascertain whether in fact they bore upon the questions in issue at the trial.[2] Thus the appellate court will not consider the exclusion of affidavits,[3] articles of incorporation or by-laws,[4] depositions,[5] letters,[6] judgment-rolls,[7] sheets of a ledger,[8] or papers generally,[9] when they do not appear in the record. Similarly, the appellate courts will not review the exclusion of a deposition when there is nothing in the record which gives the slightest intimation of its contents,[10] or which shows whether it was material, relevant or competent.[11] So, also, the rejection of the pleadings in another action cannot be reviewed when there is nothing in the record to show the character of that action or the parties thereto.[12]

§ 401. **Sufficiency of Evidence.**—The appellate court will not consider the question of the sufficiency of the evidence unless all of the evidence is included in the record on appeal.[13] The rule of law in such cases is that every intend-

2. Estate of Angle, 148 Cal. 102, 82 Pac. 668. See, also, San Francisco Commercial Agency v. Howard H. Hogan Co., 6 Cal. App. 408, 92 Pac. 312, stating the rule, and citing cases especially applicable to written evidence.

3. Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

4. Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594.

5. Adams v. Weaver, 117 Cal. 42, 48 Pac. 972; Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179, 125 Pac. 263.

6. McIntosh v. Hunt, 29 Cal. App. 779, 157 Pac. 839, 842.

7. Cahill v. Baird, 138 Cal. 691, 72 Pac. 342.

8. San Francisco Commercial Agency v. Howard H. Hogan Co., 6 Cal. App. 408, 92 Pac. 312.

9. Estate of Angle, 148 Cal. 102, 82 Pac. 668.

10. Adams v. Weaver, 117 Cal. 42, 48 Pac. 972.

11. Estate of Wineteer, 176 Cal. 28, 167 Pac. 516; Glenmore Distilling Co. v. Craig, 128 Cal. 264, 60 Pac. 858.

12. Dyer v. Leach, 91 Cal. 191, 27 Pac. 598.

13. Foster v. Young, 172 Cal. 317, 156 Pac. 476; Fay v. Fay, 165 Cal. 469, 132 Pac. 1040; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557; Estate of Yoakam, 103 Cal. 503, 37 Pac. 485; Siebe v. Joshua Hendy Machine Works, 86 Cal. 390, 25 Pac. 14; Campbell v. Walls, 77 Cal. 250, 19 Pac. 427; Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Kendall v. Waters, 68 Cal. 26, 8 Pac. 510; Owen v. Morton, 24 Cal. 373; Moore v. Tice, 22 Cal. 513; Dickinson v. Van Horn, 9 Cal. 207; Ford v. Holton, 5 Cal. 319; Bunting v. Beideman, 1 Cal. 181; Palmer v.

ment must be in favor of the verdict or decision of the court below, and in support of the judgment it will be presumed that the omitted evidence authorized the decision or judgment, unless there be something in the record to overcome such presumption.[14] This rule is applicable not only with reference to the verdict and findings supporting an ordinary judgment,[15] but also in connection with an order of nonsuit,[16] an order granting an injunction,[17] the findings of a referee,[18] and the special verdict of a jury.[19] Where a written contract is introduced in evidence, but is not included in the record, the appellate court cannot determine that the evidence is insufficient to sustain findings as to the compliance of the parties therewith.[20] It has been held that the sufficiency of the evidence to justify the verdict cannot be considered unless the record shows that a motion for new trial was not only made, but acted upon.[1]

It seems that if the appellant insists upon the insufficiency of the evidence on certain points, the record should contain all of the evidence on these points, but that the evidence not bearing on these points is irrelevant.[2] And where the record purports, in express terms, to set forth all of the evidence, the appellate court is not at liberty to presume that there was any other.[3]

Brown, 1 Cal. 42; Gonzales v. Huntley, 1 Cal. 32; Henderson v. Ward, 21 Cal. App. 520, 132 Pac. 470; Ullrich v. Santa Rosa Nat. Bank, 4 Cal. Unrep. 741, 37 Pac. 500. Accordingly, the sufficiency of the evidence cannot be reviewed where the record omits the evidence (see supra, § 166), or where the appeal is on the judgment-roll (see supra, § 167).

14. Owen v. Morton, 24 Cal. 373.

15. See generally the cases cited supra, this section. And see infra, § 515.

16. Nicholl v. Littlefield, 60 Cal. 238; Ringgold v. Haven, 1 Cal. 108.

17. Conde v. Sweeney, 14 Cal. App. 20, 110 Pac. 973.

18. Donahue v. Cromartie, 21 Cal. 80.

19. Newberg v. Hanson, 12 Cal. 280.

20. Beck v. Schmidt, 13 Cal. App. 448, 110 Pac. 455.

1. Myers v. Casey, 14 Cal. 542.

2. Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890; Harper v. Minor, 27 Cal. 107.

3. Smith v. Athern, 34 Cal. 506.

§ 402. Instructions Given or Refused.—The giving of an instruction cannot be reviewed by the appellate court unless the record sets forth the instruction in question;[4] shows that it was given and excepted to,[5] and that it was not requested by the appellant;[6] proves that harm resulted therefrom,[7] and, unless the instruction would have been erroneous under any state of facts, contains a statement of the evidence given.[8] Similarly, the refusing of an instruction cannot be reviewed unless the record sets it forth;[9] shows that it was requested and refused;[10] and states the facts of the case[11] and the evidence given.[12]

Indeed, unless all of the instructions given are contained in the record, the appellate court cannot review particular instructions given[13] or refused.[14] It cannot in such event consider instructions given, for isolated excerpts might, as an abstract proposition of law, appear errone-

4. Moore v. Gilson, 23 Cal. App. 159, 137 Pac. 268.

5. Braverman v. Fresno Canal & Irr. Co., 101 Cal. 644, 36 Pac. 386.

6. Sutter Butte Canal Co. v. American Rice etc. Co., 59 Cal. Dec. 392, 189 Pac. 277; Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128.

7. Kirk v. Santa Barbara Ice Co., 157 Cal. 591, 108 Pac. 509.

8. Bryant v. Gray, 179 Cal. 679, 178 Pac. 709; Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; People v. McCauley, 1 Cal. 379.

9. Becker v. Feigenbaum, 5 Cal. Unrep. 408, 45 Pac. 837.

10. Gilbert v. Peck, 162 Cal. 54, Ann. Cas. 1913C, 1349, 121 Pac. 315; Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373.

11. Nelson v. Mitchell, 10 Cal. 92; White v. Abernathy, Clark & Co., 3 Cal. 426; Graham v. Gregory, 1 Cal. Unrep. 12.

12. Bryant v. Gray, 179 Cal. 679, 178 Pac. 709; Frost v. Grizzly Bluff C. Co., 102 Cal. 525, 36 Pac. 929; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711; Hinkle v. San Francisco etc. R. Co., 55 Cal. 627; Brown v. Kentfield, 50 Cal. 129; Baldwin v. Bornheimer, 48 Cal. 433; Nelson v. Lemmon, 10 Cal. 49.

13. Foster v. Young, 172 Cal. 317, 156 Pac. 476; Aldrich v. Palmer, 24 Cal. 513; O'Brien v. New Method Laundry Co., 38 Cal. App. 531, 176 Pac. 879.

14. Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; Carpenter v. Sibley, 15 Cal. App. 589, 119 Pac. 391; Patton v. Klemmer, 15 Cal. App. 459, 115 Pac. 62; Churchill v. More, 4 Cal. App. 219, 88 Pac. 290.

ous, while the instructions, considered as a whole, might constitute a correct statement of the law.[15] Nor can it consider instructions refused, for it will presume that the substance of the requested instructions was otherwise presented to the jury.[16] In this connection it may be remembered that instructions set forth only in the specifications of error, under the former practice, were not made a part of the record and could not be considered on appeal.[17]

§ 403. Disposition of Motion for New Trial.—The appellate court will not review an order disposing of a motion for a new trial if the record is insufficient.[18] Thus, it will not consider such an order where the record does not contain the moving papers,[19] or does not show the motion itself or the grounds thereof.[20] An order granting a new trial on the ground that the jury disregarded instructions will not be reviewed in the absence

15. Foster v. Young, 172 Cal. 317, 156 Pac. 476.

16. Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466.

17. See supra, § 238.

18. Galvin v. Fannen, 154 Cal. 774, 99 Pac. 183; Blood v. La Serena Land & W. Co., 150 Cal. 764, 89 Pac. 1090; Oakland Gaslight Co. v. Dameron, 57 Cal. 292; Union Lumber Co. v. Webster, 15 Cal. App. 165, 113 Pac. 891; Sirkus v. Central R. Co., 3 Cal. Unrep. 535, 30 Pac. 790. And see, generally, the cases cited infra, this section.

19. Galvin v. Fannen, 154 Cal. 774, 99 Pac. 183 (bill of exceptions); Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524 (bill of exceptions); Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Hancock v. Thom, 46 Cal. 643 (affidavits); Freeborn v. Glazer, 10 Cal. 337; Keating v. Keating, 23 Cal. App. 384, 138 Pac. 118 (statement on motion for new trial); Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459 (affidavits); Branger v. Chevalier, 9 Cal. 353 (affidavits). In Branger v. Chevalier, 9 Cal. 353, however, the court points out that the omission of the moving affidavits only deprives the appellant of the ground of error based thereon.

20. Williams v. Hawley, 144 Cal. 97, 77 Pac. 762 (discussing what is a sufficient showing of the grounds of the motion; Davies v. Stark, 25 Cal. App. 519, 144 Pac. 315; Carver v. San Joaquin Cigar Co., 16 Cal. App. 761, 118 Pac. 92; Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560.

of the instructions,[1] and a motion to dismiss a motion for new trial will not be reviewed unless the facts in support thereof appear in the record.[2] An order denying a motion for new trial on the ground of newly discovered evidence was not reviewable unless the record contained the evidence given at the trial,[3] and the evidence newly discovered.[4] In reviewing an order granting a new trial, however, the appellate court is not limited to a review of the grounds considered by the lower court if other grounds are presented by the record.[5]

§ 404. Miscellaneous Questions.—The appellate court will not consider the ground on which the lower court acted unless it is disclosed by the record.[6] It will not review the failure to serve an amended complaint where it does not appear in the record.[7] Where a new trial is granted unless the plaintiff waives a portion of the judgment awarded, the defendant in appealing from the judgment and order, must show in the record that the amount was remitted, or it will be unnecessary for the appellate court to examine and pass upon the questions attempted to be presented.[8]

Statute of limitations.—If the record on appeal does not show when the action in question was commenced, there is an entire absence of a fact without which the appellate court can form no opinion upon the question presented.[9] Consequently, if the appellate court is to con-

1. Miller v. Griffith, 4 Cal. App. 341, 88 Pac. 285.

2. Macy v. Davila, 48 Cal. 646.

3. Oakland Gaslight Co. v. Dameron, 57 Cal. 292.

4. West v. Mears, 17 Cal. App. 718, 121 Pac. 700; Union Lumber Co. v. Webster, 15 Cal. App. 165, 113 Pac. 891.

5. Frost v. Los Angeles R. Co., 165 Cal. 365, 132 Pac. 442; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152; Tibbetts v. Bower, 121 Cal. 7, 53 Pac. 359; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481. See infra, § 478.

6. Lillie v. Andrews, 24 Cal. App. 10, 139 Pac. 1081.

7. Heinlen v. Erlanger, 2 Cal. Unrep. 257, 3 Pac. 129.

8. Gross v. Kelleher, 80 Cal. 519, 22 Pac. 293.

9. Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635.

sider a defense founded upon the statute of limitations, the record should show when the complaint was filed,[10] and the judgment-roll should include the original complaint even if it has been superseded by an amended complaint,[11] and also the answer or demurrer.[12] A contention that the plaintiff's demand is stale cannot be sustained if the complaint, on its face, does not show a stale demand, and there is nothing in the findings or conclusions of the court below to suggest such a defense.[13]

Constitution of jury.—An objection to the drawing and constitution of the jury will not be considered if there is nothing in the record to show that the jury was not what the appellant claims it ought to have been.[14] An objection to the court's refusal to allow a challenge for bias will not be reviewed unless the record shows that a peremptory challenge was exercised upon the juror, or that the peremptory challenges were exhausted.[15]

Arguments and reading to jury.—Error predicated on irregular remarks of counsel in addressing the jury cannot be considered where the record does not contain the language used or show the extent or character of the alleged irregularity.[16] The appellate court cannot consider the fact that in reinstructing the jury, a portion of certain testimony was read to them from the shorthand reporter's notes, unless the record shows what portion of the testimony was thus read.[17]

10. Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635; Fratt v. Toomes, 48 Cal. 28; Hoffman v. Fett, 39 Cal. 109.

11. Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635; Cameron v. San Francisco, 68 Cal. 390, 9 Pac. 430.

12. Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51. See LIMITATION OF ACTIONS.

13. Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860.

14. Bostwick v. Mahoney, 73 Cal. 238, 14 Pac. 832.

15. Melone v. Sierra R. Co., 151 Cal. 113, 91 Pac. 522 (citing earlier cases; see, also, CRIMINAL LAW).

16. Sutliff v. Seidenberg, 132 Cal. 63, 64 Pac. 131, 469. See TRIAL.

17. Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386.

Orders relating to costs.—An order with regard to costs will not be reviewed where the record fails to show what costs had accrued,[18] fails to include a bill of costs or an order thereon,[19] or fails to show any objection to costs, or any ruling or judgment involving them.[20] An order denying a motion to strike out a bill of costs will not be considered if the record does not show the papers or evidence offered at the hearing of the motion.[1] Similarly, an order disposing of a motion to retax costs will not be considered on appeal where the record does not include the notices and affidavits filed on the motion,[2] but will be reversed if the record shows error.[3]

J. ASSIGNMENT AND SPECIFICATION OF ERRORS.

I. NATURE AND NECESSITY FOR.

§ 405. In General.—California practice provided for a specification of errors in the statement on appeal and statement on motion for new trial prior to 1915, and both before and since that time, for a specification in the statement on new trial or bill of exceptions of the particulars in which the evidence is alleged to be insufficient to sustain the verdict or decision.[4] The specification of errors in the statement on motion for new trial was regarded under the Practice Act as a part of the statement. It was not intended merely for use as points at the argument, but as part of the case, and to enable the adverse party to propose amendments presenting such matters as in his judgment tended to sustain the verdict or decision.[5] It served

18. Farmers' Exch. Bank v. Altura etc. Min. Co., 129 Cal. 263, 61 Pac. 1077.

19. In re Pina's Estate, 7 Cal. Unrep. 101, 71 Pac. 171.

20. People v. County of Marin, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203. See COSTS.

1. Fraser v. Fraser, 39 Cal. App. 467, 179 Pac. 427.

2. Gates v. Buckingham, 4 Cal. 286.

3. Fay v. Fay, 165 Cal. 469, 132 Pac. 1040.

4. See infra, § 407.

5. Butterfield v. Central Pac. R. R. Co., 37 Cal. 381.

to select out of the mass of alleged errors and insufficiency found in the statement, and by this selection to preserve such of the matters appearing therein upon which it was the purpose of the party to finally rely in support of the motion.[6]

Under the code, a specification of the particulars in which the evidence is insufficient to sustain the verdict or decision is in the nature of a notice to the opposing party and the court, so that such party may propose such amendments to the statement or bill of exceptions as may be necessary to sustain the findings and so that the court may abbreviate the statement or bill of exceptions by striking out redundant and useless matter.[7]

An assignment of errors at common law was in the nature of a pleading,[8] to which there was a demurrer or joinder in error.[9] In the strict common-law sense of the term it was a formal specification of the points or particular errors relied on by the appellant as grounds for reversal.[10] It did not constitute a part of the transcript but was founded upon it, and was filed in the appellate court at or subsequent to the time of filing the transcript.[11] The filing of such an assignment of errors was never required under the system of practice in California, though the term has often been used in the reports in a sense somewhat different from, but analogous to, its common-law sense.[12]

6. People v. Central Pac. R. R. Co., 43 Cal. 398.

7. See infra, §§ 409, 410.

8. Miller v. Wade, 87 Cal. 410, 25 Pac. 487; Hutton v. Reed, 25 Cal. 478.

9. Hutton v. Reed, 25 Cal. 478.

10. Hutton v. Reed, 25 Cal. 478; Squires v. Foorman, 10 Cal. 298.

11. Hutton v. Reed, 25 Cal. 478.

12. Butterfield v. Central Pac. R. R. Co., 37 Cal. 381 (a document designated as an assignment of errors, appended to the end of the transcript and not filed in the case until nearly a month after the statement was settled by the judge, is what was denominated an assignment of errors at common law and is unknown to our system of practice); Hutton v. Reed, 25 Cal. 478 (reviewing Sayre v. Smith, 11 Cal. 129, People v. Comedo, 11 Cal. 70, People v. Goldbury, 10 Cal. 312, and Squires v. Foorman, 10 Cal. 298, and stating that the records of the court, so far as is ascertainable, do not show a dismissal of an appeal for want of an assignment of error in any other sense than

§ 406. Specification of Errors of Law—*Under Practice Act.*—In the statement on appeal under the Practice Act, a party intending to appeal was required before 1863 to state the grounds upon which he intended to rely and so much of the evidence as might be necessary to explain the grounds and no more;[13] and, after the amendment of 1863, to state specifically the particular errors or grounds upon which he intended to rely.[14] It was optional with the appellant whether to make a statement or not. If he made no statement, it was not necessary that there should be in the transcript or on file what had hitherto been denominated an assignment of errors, or any statement of the grounds upon which he relied, as neither the statutes nor the rules of the court required it. In such case, only the errors appearing on the judgment-roll could be considered.[15] But if he made a statement, the specification of the errors or grounds was an essential element of the

for want of a specific statement of errors, or of anything in the nature of a brief on the part of the appellant to direct the attention of the court to the points relied on, or aid the court in the examination of the record). See, also, Brooks, Clark & Co. v. Townsend, 4 Cal. 286 (dismissing appeal for want of assignment of errors).

13. People v. Banvard, 27 Cal. 470; Walls v. Preston, 25 Cal. 59; Wixon v. Bear River & Auburn W. & M. Co., 24 Cal. 367, 85 Am. Dec. 69; Dobbins v. Dollarhide, 15 Cal. 374; Barrett v. Tewksbury, 15 Cal. 354.

14. Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Cross v. Zane, 45 Cal. 89; Leffingwell v. Griffing, 29 Cal. 192; Haggin v. Clark, 28 Cal. 162; Burnett v. Pacheco, 27 Cal. 408; Estate of Boyd, 25 Cal. 511 (on appeal from probate court); Hutton v. Reed, 25 Cal. 478. See City of Stockton v. Creanor, 45 Cal. 247, holding that the question of the insufficiency of the evidence could not be presented by means of a statement on appeal.

15. Solomon v. Reese, 34 Cal. 28; Burnett v. Pacheco, 27 Cal. 408; Millard v. Hathaway, 27 Cal. 119; Hutton v. Reed, 25 Cal. 478; American River Water & Min. Co. v. Bear River Water & Min. Co., 11 Cal. 339.

When the parties stipulated all the facts in a case and agreed that the stipulation should be part of the judgment-roll and that no other statement should be required, no statement on appeal, and consequently no specification of errors, was necessary; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

statement,[16] and errors or grounds not specified therein were not reviewable on appeal.[17]

Under the code.—In the statement on motion for new trial, the Practice Act, as originally enacted, required a party intending to move for a new trial to prepare a statement of the grounds upon which he intended to rely. This act was amended in 1861,[18] and again in 1863. The statute as last amended was incorporated in the code in 1874, where it remained until 1915. As originally appearing in the code, the act provided that

"When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion."[19]

16. Barrett v. Tewksbury, 15 Cal. 354.

17. Wixon v. Bear River & A. W. & Min. Co., 24 Cal. 367, 85 Am. Dec. 69; Mamlock v. White, 20 Cal. 598, holding that where, in an action for recovery of personalty claimed by one party by virtue of a sale on attachment, no objection is made to the failure to prove the attachment debt or the bond and affidavit of attachment, and such failure is not specified as a ground of error in the statement on appeal, the question is not reviewable on appeal.

18. Hutton v. Reed, 25 Cal. 478.

19. Code Civ. Proc., § 659, subd. 3 (Stats. 1863, p. 643); Light v. Stevens, 159 Cal. 288, 113 Pac. 659 (general specification); Hall v. Susskind, 120 Cal. 559, 53 Pac. 46 (specification held insufficient); Kumle v. Grand Lodge A. O. U. W., 110 Cal. 204, 214, 42 Pac. 634 (specification held insufficient); Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590; Braly v. Henry, 77 Cal. 324, 19 Pac. 529 (a specification contrary to the bill of exceptions will not be considered); Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711 (a specification that the court erred in ordering judgment for the plaintiff on the findings is insufficient for any purpose); Fleming v. Albeck, 67 Cal. 226, 7 Pac. 659 (a specification will be considered though the place in the transcript where the error is to be found is not correctly given); Wilson v. Wilson, 45 Cal. 399 (a specification that the court erred in rendering judgment for the plaintiff is too general); Sanchez v. McMahon, 35 Cal. 218; Haggin v. Clark, 28 Cal. 162 (an assignment that an order is against the law is too general); Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470; Carter v. Allen, 2 Cal. Unrep. 399, 4 Pac. 1064;

Inasmuch as the trial court was directed to disregard the statement if it did not contain a specification as required by the statute, it followed that the appellate court could not consider a statement deficient in this respect.[20] It will clarify an understanding of the rule and the bearing of the changes in the law to note that under the present practice specifications of error, when required, relate only to the form of exceptions when upon the ground of the insufficiency of the evidence to justify the verdict or decision. "In all such instances the objection must specify the particulars in which such evidence is alleged to be insufficient." If the appeal is taken by the new or alternative method and a transcript is used in lieu of a bill of exceptions, no specifications of error are necessary.[1] It is to be noted also that lack of specifications of error is not a ground for dismissal of an appeal.[2] Under the rule requiring a specification of particular errors, those not assigned are deemed to have been waived, and cannot be reviewed,[3] un-

Hendrick v. Hitchcock, 1 Cal. Unrep. 347; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 Pac. 166.

20. Ackley v. Fishbeck, 124 Cal. 409, 57 Pac. 207 (a so-called "assignment of errors" which is not authenticated as part of the record or shown to have been considered on the motion will not, on appeal from the order on the motion, be considered); Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012 (the fact that the motion was made on the minutes of the court does not obviate a specification in the statement to be made after the hearing of the motion); Hershey v. Kness, 75 Cal. 115, 16 Pac. 548; Crane v. Gladding, 59 Cal. 303; People v. Central Pacific R. R. Co., 43 Cal. 398; Harding v. Vandewater, 40 Cal. 77; Butterfield v. Central Pacific R. R. Co., 37 Cal. 381; Vilhac v. Biven, 28 Cal. 409; Sprigg v. Barber, 6 Cal. Unrep. 161, 54 Pac. 899. See infra, § 407, as to specification of insufficiency of evidence.

1. See infra, §§ 407, 411.

2. Kurtz v. Cutler, 178 Cal. 178, 172 Pac. 590.

3. Roberts v. Hall, 147 Cal. 434, 82 Pac. 66 (the appellate court is confined to the particulars specified in the statement); Estate of Black, 132 Cal. 392, 64 Pac. 695 (error in giving instructions not reviewed); Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590; Himmelmann v. Hoadley, 44 Cal. 213; Crosett v. Whelan, 44 Cal. 200; Hawkins v. Abbott, 40 Cal. 639; Richardson v. Kier, 37 Cal. 263 (error in refusing instruction not reviewed); Crowther

less the error be apparent on the face of the judgment-roll and an appeal lies from the final judgment.[4]

The rule is declared by many of the authorities that no specification of the particular errors of law on which the appellant intends to rely need be made in a bill of exceptions in order that the errors therein set forth may be reviewed upon appeal.[5] And of course no assignment or specification of errors is necessary or proper in a notice of appeal.[6]

§ 407. Specification of Insufficiency of Evidence Generally.—The code provision relating to bills of exceptions

v. Rowlandson, 27 Cal. 376; Moore v. Murdock, 26 Cal. 514; Moore v. Moore, 2 Cal. Unrep. 510, 7 Pac. 688; Ryer v. Hicks, 1 Cal. Unrep. 234; Smith v. Sinbad Development Co., 11 Cal. App. 253, 104 Pac. 706; Kelly v. Ning Yung Benev. Assn., 2 Cal. App. 460, 84 Pac. 321. See Stuart v. Lord, 138 Cal. 672, 72 Pac. 142 (holding it was not necessary, however, for the appellant to specify in what particular he claimed the decision was against the law).

An error in granting a nonsuit is an error of law and must be specified in a statement on motion for new trial. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243, distinguished in Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; McCreery v. Everding, 44 Cal. 284; Donahue v. Gallavan, 43 Cal. 573. See Converse v. Scott, 137 Cal. 239, 70 Pac. 13, where error was specified in a bill of exceptions. See infra, §§ 407, 408, as to specification of evidence.

4. Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Putnam v. Lamphier, 36 Cal. 151 (the point that the judgment is not authorized by the pleadings is such an error and need not be specified); Sharp v. Daughney, 33 Cal. 505 (the sufficiency of a pleading setting up matters of defense need not be specified).

5. Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Snell v. Payne, 115 Cal. 218, 46 Pac. 1069; Barfield v. South Side Irr. Co., 111 Cal. 118, 43 Pac. 406 (overruling Miller v. Wade, 87 Cal. 410, 25 Pac. 487. Furthermore, the opinion of Mr. Justice Works in this case was not concurred in by a majority of the court); Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297. See Matter of Baker, 153 Cal. 537, 96 Pac. 12 (holding errors of law not important on a determination of the case on the merits).

6. Burnett v. Pacheco, 27 Cal. 408.

provides that when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which the evidence is alleged to be insufficient.[7] There was a similar provision with reference to statements on motion for new trial in the Practice Act as amended in 1861,[8] and in the Code of Civil Procedure prior to 1915, before statements on motion for new trial were abolished.[9]

7. Code Civ. Proc., § 648; Mills v. Brady, 61 Cal. Dec. 376; Beeson v. Schloss, 60 Cal. Dec. 257, 192 Pac. 292; Martin v. Hildebrand, 60 Cal. Dec. 29, 191 Pac. 676; Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394; Knoch v. Haizlip, 163 Cal. 146, 124 Pac. 998; Matter of Baker, 153 Cal. 537, 96 Pac. 12; Worth v. Worth, 155 Cal. 599, 102 Pac. 663; Matter of Baker, 153 Cal. 537, 96 Pac. 12; Estate of Behrens, 130 Cal. 416, 62 Pac. 603; Commercial Bank of Madera v. Redfield, 122 Cal. 405, 55 Pac. 160, 772; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Snell v. Payne, 115 Cal. 218, 46 Pac. 1069; Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604 (such specification cannot be made for the first time in brief of counsel); Malone v. Del Norte County, 77 Cal. 217, 19 Pac. 422; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Phillips v. Lowrey, 54 Cal. 584; Rider v. Edgar, 54 Cal. 127; Spect v. Gregg, 51 Cal. 198; Coveny v. Hale, 49 Cal. 552; Thorne v. Hammond, 46 Cal. 530; Davis v. Lamb, 5 Cal. Unrep. 765, 35 Pac. 306; Moore v. Franklin, 33 Cal. App. Dec. 62, 192 Pac. 1047; W. P. Fuller & Co. v. McClure, 32 Cal. App. Dec. 574, 191 Pac. 1027; Newbury v. Lineberger, 31 Cal. App. Dec. 247, 188 Pac. 72; Smith v. Meade, 36 Cal. App. 173, 171 Pac. 815; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Layne v. Johnson, 19 Cal. App. 95, 124 Pac. 860; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113; Coghlan v. Quartararo, 15 Cal. App. 662, 115 Pac. 664.

8. Practice Act, § 190.

9. Code Civ. Proc., § 659, subd. 3; Crow v. Crow, 168 Cal. 607, 143 Pac. 689; O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950; Baum v. Roper, 132 Cal. 42, 64 Pac. 128; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; McLennan v. Wilcox, 126 Cal. 51, 58 Pac. 305; Kumle v. Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. 634; Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; Menk v. Home Ins. Co., 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Crane v. Gladding, 59 Cal. 303; Fabian & Co. v. Callahan, 56 Cal. 159; Douglas v. Fulda, 54 Cal. 589; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Smith v.

The rule has been stated as follows in a very recent decision:

"Even though a motion for a new trial must now be made upon the minutes of the court and no bill of exceptions is necessary or can be used for the purposes of the motion in the lower court, yet where the motion is denied, and it is sought to review the order denying it on appeal, and the record is not brought up in the manner prescribed by section 953a, Code of Civil Procedure (the so-called new method), it can only be brought up by a bill of exceptions prepared and settled after the order denying the motion is made in conformity with the practice which has always prevailed in connection with motions for a new trial made upon the minutes. . . . And to such a bill of exceptions, . . . section 648, Code of Civil Procedure, requiring a specification of the particulars in which the findings are not supported by the judgment, applies."[10]

Upon such an appeal, therefore, if there is no specification of the particulars in which the evidence was insufficient, or if the specification made is defective and not entitled to consideration, the appellate court cannot review the question as to the sufficiency of the evidence to sustain the findings or verdict, but must accept the findings of fact or the verdict as true,[11] at least if there is not

Christian, 47 Cal. 18 (a specification of error cannot be treated as a specification of particulars wherein the evidence was insufficient); Foote v. Richmond, 42 Cal. 439; Reed v. Bernal, 40 Cal. 628; Harding v. Vandewater, 40 Cal. 77; Green v. Killey, 38 Cal. 201; Sanchez v. McMahon, 35 Cal. 218; Reamer v. Nesmith, 34 Cal. 624; Harper v. Minor, 27 Cal. 107; Moore v. Murdock, 26 Cal. 514; Petersen v. Taylor, 4 Cal. Unrep. 335, 34 Pac. 724; Hendrick v. Hitchcock, 1 Cal. Unrep. 347; Havens v. Dale, 1 Cal. Unrep. 237; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Holland v. Canty, 23 Cal. App. 91, 137 Pac. 276; Johnston v. Blanchard, 16 Cal. App. 321, 116 Pac. 973; Knapp & Co. v. San Joaquin Cigar Co., 10 Cal. App. 325, 101 Pac. 929; Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 Pac. 166.

10. Mills v. Brady, 61 Cal. Dec. 376 (decision in Bank rendered March 17, 1921, citing Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Martin v. Hildebrand, 60 Cal. Dec. 29, 191 Pac. 676; Carter v. Canty, 181 Cal. 749, 186 Pac. 346). And see cases cited infra.

11. Regoli v. Stevenson, 179 Cal. 257, 176 Pac. 158; Binford v. Boyd,

an entire absence of evidence to sustain the finding. The appellate court cannot set aside a verdict or decision on this ground even though one of the grounds for a new trial was that the verdict or decision was against law,[12] or such insufficiency is specified in the notice of motion for new trial.[13] And it is immaterial in this respect whether the appeal be taken from a judgment or an order on motion for new trial,[14] or whether the statement or bill of exceptions contains all the evidence received at the

178 Cal. 458, 174 Pac. 56; Bird v. American Surety Co., 175 Cal. 625, 166 Pac. 1009; Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Worth v. Worth, 155 Cal. 599, 102 Pac. 663; Matter of Baker, 153 Cal. 537, 96 Pac. 12; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Estate of Heaton, 135 Cal. 385, 67 Pac. 321; Estate of Behrens, 130 Cal. 416, 62 Pac. 603; Citizens' Bank of Los Angeles v. Jones, 121 Cal. 30, 53 Pac. 354; Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; Green v. Green, 103 Cal. 108, 37 Pac. 188; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Hurlbutt v. N. W. Spaulding Saw Co., 93 Cal. 55, 28 Pac. 795; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647; San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Malone v. Del Norte County, 77 Cal. 217, 19 Pac. 422; Heilbron v. Kings River & Fresno Canal Co., 76 Cal. 11, 17 Pac. 933; Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581; Perham v. Kuper, 61 Cal. 331; Bonner v. Quackenbush, 51 Cal. 180; Watson v. San Francisco & Humboldt Bay R. R. Co., 50 Cal. 523; Doherty v. Enterprise Min. Co., 50 Cal. 187; Coveny v. Hale, 49 Cal. 552; Brumagim v. Bradshaw, 39 Cal. 24; Spanagel v. Dellinger, 38 Cal. 278; Cowing v. Rogers, 34 Cal. 648; Wixon v. Bear River & A. W. & Min. Co., 24 Cal. 367, 85 Am. Dec. 69; Pickering Light & Water Co. v. Savage, 6 Cal. Unrep. 985, 69 Pac. 846; Davis v. Lamb, 5 Cal. Unrep. 765, 35 Pac. 306; Franklin v. Le Roy, 1 Cal. Unrep. 806; Holland v. Canty, 23 Cal. App. 91, 137 Pac. 276; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370; Coghlan v. Quartararo, 15 Cal. App. 662, 115 Pac. 664; Fitzhugh v. Mason, 2 Cal. App. 220, 83 Pac. 282. See Braly v. Henry, 77 Cal. 324, 19 Pac. 529, where the court waived the omission and determined that the evidence was sufficient.

12. Brumagim v. Bradshaw, 39 Cal. 24.

13. Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394.

14. Mills v. Brady, 61 Cal. Dec. 376; Moore v. Franklin, 33 Cal. App. Dec. 62, 192 Pac. 1047; Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394; Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177;

trial.[15] If certain particulars are specified wherein the evidence is insufficient to sustain the verdict or findings, the appellant cannot on appeal urge that the verdict or findings are unsupported in other particulars.[16] When, however, the appellant proceeds under section 953a of the Code of Civil Procedure in preparing the record on appeal, an authenticated reporter's transcript may be used on appeal instead of a bill of exceptions, and no specification of the insufficiency of the evidence need be made. Such specification is required in a bill of exceptions, not primarily for use on appeal, but for information of the opposing party and the court below, so that they may be advised as to the matter that should be inserted in the bill. As the reporter's transcript contains all the evidence taken, there is no occasion for any such specification, and the code does not require them to be inserted therein.[17]

§ 408. Review of Particular Matters.—To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify the verdict, and a specification of particulars is necessary if such question is to be reviewed on appeal.[18] The code does not require a specification of the insufficiency of the evidence on appeals from appealable orders, although such orders are often founded upon evidence dehors the pleadings. Neither does it require such specification upon an appeal from a judgment to enable the court to review non-

Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Coghlan v. Quartararo, 15 Cal. App. 662, 115 Pac. 664.

15. Newbury v. Lineberger, 31 Cal. App. Dec. 247, 188 Pac. 72. Compare § 409.

16. Citizens' Bank of Los Angeles v. Jones, 121 Cal. 30, 53 Pac. 354; Meads, Seaman & Co. v. Lasar, 92 Cal. 221, 28 Pac. 935; Brown v. Stark, 83 Cal. 636, 24 Pac. 162; Kennedy v. Dunn, 58 Cal. 339; First Nat. Bank v. Kelso, 5 Cal. Unrep. 40, 40 Pac. 427.

17. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981; Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 Pac. 158.

18. Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067 (quoting Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. 774; Jones v. Shay, 50 Cal. 508.

appealable, intermediate orders affecting the judgment.[19] Accordingly, the rule is stated that an order granting or denying a motion for nonsuit may be reviewed without a specification of insufficiency of evidence, notwithstanding such review may involve a question of the sufficiency of the evidence to make a prima facie case for the plaintiff.[20] Nor is a specification of insufficiency of the evidence necessary where a finding outside the issues is made;[1] or where the court strikes out testimony of a witness on the ground that he is incompetent. The latter ruling is properly presented by an exception thereto.[2]

II. FORM AND REQUISITES.

§ 409. Policy of Courts as to Sufficiency.—There has been a decided change in the policy of the courts with reference to the specifications of the particulars in which the evidence is insufficient to sustain the verdict or decision. In many of the cases the specification seems to have been regarded as a pleading, as a sort of a complaint in error, where all intendments were against the pleader, and where the moving party was not even allowed the benefit of the rule that errors should be disregarded, if injury had not been done. But this view is now discredited. The specification is in the nature of a notice, and its sufficiency should be tested by inquiring whether the opposite party is injured by defects. It is not even to be regarded with the strictness with which an error of the court must be. If error at all, it is committed by a party, and in a matter

19. Clifford v. Allman, 84 Cal. 528, 24 Pac. 292.

20. Beeson v. Schloss, 60 Cal. Dec. 257, 192 Pac. 292; Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; Donahue v. Gallavan, 43 Cal. 573; Western California Land Co. v. Welch, 41 Cal. App. 435, 183 Pac. 169.

1. Fiske v. Casey, 4 Cal. Unrep. 558, 36 Pac. 668.

2. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131 (a specification that the evidence is insufficient to sustain a finding of incompetency is not required).

where great liberality should be exercised by the courts.[3] Therefore, the earlier strictness of the rule governing the sufficiency of specifications has properly been abated by the later decisions in harmony with the more liberal view which will insure a hearing upon appeal where reasonable and ordinarily careful precautions have been taken to present specifications, rather than to defeat the right to be heard upon purely technical grounds.[4]

The principal object in requiring a specification of the particulars in which the evidence is insufficient to justify the verdict or decision is to abbreviate the statement of evidence by restricting it to such as is relevant and material to prove or disprove the specified fact. By the specifications required, the opposing party and the judge are notified of the exact points of contest, and thereby enabled to determine what evidence should be brought into the bill of exceptions, or, under the former practice, the statement, and what should be excluded from it.[5] The

3. Murphy v. Magee, 169 Cal. 710, 147 Pac. 948; American Type Founders' Co. v. Packer, 130 Cal. 459, 62 Pac. 744 (per Temple, J.); Pacific Gas & Electric Co. v. Rollins, 32 Cal. App. 782, 164 Pac. 53 (formerly the court refused to consider the point attempted to be raised even where the statement in the specification was informal merely); Taylor v. Northern Electric Ry. Co., 26 Cal. App. 765, 148 Pac. 543; Smith v. Sinbad Dev. Co., 11 Cal. App. 253, 104 Pac. 706; Ahlers v. Barrett, 4 Cal. App. 158, 87 Pac. 232. See NEW TRIAL.

4. Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Seymour v. Oelrichs, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88 (now the courts are not disposed to scrutinize the specifications of insufficiency with the minuteness applied in the earlier cases); Churchill v. Woodworth, 148 Cal. 669, 113 Am. St. Rep. 324, 84 Pac. 155; Southern Pacific Co. v. Lipman, 148 Cal. 480, 83 Pac. 445; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939; Bell v. Staacke, 141 Cal. 186, 74 Pac. 774; Holmes v. Hoppe, 140 Cal. 212, 73 Pac. 1002; Liurette v. Hiller, 139 Cal. 729, 73 Pac. 836; Beall v. Bekins Van & Storage Co., 33 Cal. App. 652, 166 Pac. 370; Taylor v. Northern Electric Ry. Co., 26 Cal. App. 765, 148 Pac. 543; Eidinger v. Sigwart, 13 Cal. App. 667, 11 Pac. 521.

5. Osborn v. Hopkins, 160 Cal. 501, Ann. Cas. 1913A, 413, 117 Pac. 519; Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113; American Type Founders' Co. v. Packer, 130 Cal. 459, 62 Pac. 744; De Molera v. Martin, 120 Cal. 544,

statute in this matter is not primarily for the appellate court, but for the trial court, and the respondent.[6] Hence, whenever there is a reasonably successful effort to state the particulars, and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, the court of review ought not to refuse to consider the case upon appeal, especially where the transcript shows that all the evidence has been brought up.[7]

§ 410. **Form and Sufficiency in General.**—No particular form of specification is necessary,[8] and it is not necessary to refer to the evidence except to state that it is insufficient to sustain the particular finding.[9] But it is neces-

52 Pac. 825; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Eddelbuttel v. Durrell, 55 Cal. 277; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297.

6. American Type Founders' Co. v. Packer, 130 Cal. 459, 62 Pac. 744.

7. Clark v. Casselman, 177 Cal. 82, 169 Pac. 1005; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86; Liurette v. Hiller, 139 Cal. 729, 73 Pac. 836 (but if the specification is insufficient to advise opposing counsel and the court of the grounds upon which the attack is to be made, it will not be considered); Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142 (bill of exceptions); Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Laidlaw v. Pacific Bank, 137 Cal. 392, 70 Pac. 277; Estate of Motz, 136 Cal. 558, 69 Pac. 294; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; American Type Founders' Co. v. Packer, 130 Cal. 459, 62 Pac. 744 (per Temple, J.); Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661. "When the attention of the court and the adverse party is directed to the particular point on which the evidence is claimed to be insufficient, the specification is sufficient." Per Belcher, Commissioner, Estate of Yoakam, 103 Cal. 503, 37 Pac. 485 (quoted in Abbott v. Jack, 136 Cal. 510, 69 Pac. 257). See Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113 (where the statement contains all the testimony, the respondent has no ground for saying that if the particulars had been more specifically pointed out, he might have caused it to appear that there was additional evidence in support of the decision).

8. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; People v. Parrott, 1 Cal. Unrep. 412.

9. Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700 (limiting expressions in Kyle v. Craig, 125 Cal. 107, 57 Pac. 791, which might be understood to imply the contrary); Baird v. Peall, 92 Cal. 235, 28 Pac. 285 (holding no statement of the evidence nor

sary clearly to designate the finding (or the parts of the finding) assailed,[10] and to show that there is no substantial evidence to support the finding assailed.[11] Of course, if there is no evidence to sustain a particular finding, a statement to that effect is sufficient, without specifying the particulars. In such case, the burden should be on the party sustaining the findings to call attention, at least, to enough evidence to sustain the one assailed.[12]

§ 411. Directing Specification at Findings of Fact.— Inasmuch as it is clear that a judgment supported by a verdict or findings cannot be assailed on the ground that it is not supported by the evidence, so long as the verdict or findings remain undisturbed, the attack must be, not upon the judgment directly, but upon the verdict or findings which support it.[13] Specifications as to the insufficiency must be directed to material findings of fact.[14] This statement is borne out by the provision of the code which requires a specification of the insufficiency of the evidence "to justify the verdict or decision."[15] The word "decision" in this provision, placed as it is in opposition to the word "verdict," obviously refers to the findings of fact and conclusions of law mentioned in section 633 of the same code.[16] A specification pointed at the

deduction therefrom by way of argument is proper in connection with the specification).

10. See infra, § 412.

11. Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515; Sprigg v. Barber, 6 Cal. Unrep. 161, 54 Pac. 899.

12. Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253 (even where there is slight but insufficient evidence to support a particular finding, every purpose of the law is answered by a specification that there is no evidence); Estate of Behrens, 130 Cal. 416, 62 Pac. 603; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Knott v. Peden, 84 Cal. 299, 24 Pac. 160; Rousseau v. Cohn, 20 Cal. App. 469, 129 Pac. 618; Ahlers v. Barrett, 4 Cal. App. 158, 87 Pac. 232.

13. Reed v. Bernal, 40 Cal. 628.

14. Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515.

15. Code Civ. Proc., § 648.

16. Steen v. Hendy, 4 Cal. Unrep. 916, 38 Pac. 718; Clifford v. Allman, 84 Cal. 528, 24 Pac. 292; Coveny v. Hale, 49 Cal. 552.

judgment and stating that it is contrary to the evidence will not enable the court to inquire whether the findings are justified by the evidence, and is therefore insufficient. Especially is this so where it is evident that the specification is directed to the general conclusion and not to the findings of fact.[17] Likewise, specifications should not be directed at conclusions of law. But if the court includes in its findings that which is more properly a conclusion of law, and if such so-called finding raises an implication of certain facts, a specification directed to such finding is insufficient.[18] Of course, the finding assailed must have been actually found by the court or jury. If there is no such finding as that set out, the specification will be disregarded.[19]

§ 412. Particularity as to "Verdict or Decision."—The code requires that the specification state the particulars in which such evidence is alleged to be insufficient "to justify the verdict or decision."[20] The verdict or decision involves finding on all the facts necessary to support the judgment, and it is the duty of the party to specify the particular finding of fact which is alleged not to be supported by the evidence.[1] Notwithstanding the earlier

17. Coveny v. Hale, 49 Cal. 552; People v. Parrott, 1 Cal. Unrep. 412; Rousseau v. Cohn, 20 Cal. App. 469, 129 Pac. 618.

18. Murphy v. Magee, 169 Cal. 710, 147 Pac. 948.

19. Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

20. Code Civ. Proc., § 658; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (explained in Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700); Knott v. Peden, 84 Cal. 299, 24 Pac. 160; Coleman v. Gilmore, 49 Cal. 340 (holding section 195 of the Practice Act, a similar provision, imperative). And see the following cases decided under the Practice Act: Beans v. Emanuelli, 36 Cal. 117; Carleton v. Townsend, 28 Cal. 219.

1. Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Holmes v. Hoppe, 140 Cal. 212, 73 Pac. 1002 (a specification that the evidence is insufficient to justify the decision that no settlement was made between the defendant and plaintiff's assignor is sufficient under the strictest rule ever followed); Thorne v. Hammond, 46 Cal. 530 (holding that a specification that plaintiff showed no right of possession of the premises sued for is applicable to any of a series of alleged facts on

strictness of the rule governing the sufficiency of specifications has been much abated by later decisions, it is nevertheless necessary in any case that the specification convey a fair and correct knowledge both to the adverse party and to the trial court of the precise findings excepted to.[2] If a general verdict is returned, it is insufficient merely to state that there is no evidence to support the verdict.[3] And if the case is tried by the court and more than one finding is made, it is not sufficient to state that the "findings" are not supported by the evidence,[4] or that upon the facts and evidence the court should have rendered its decision for the appellant.[5] The specification should in some form distinguish each particular proposition of fact excepted to from all others found by the court or involved in a general verdict of the

which the plaintiff relied to show possession, and that it is insufficient).

2. Crow v. Crow, 168 Cal. 607, 143 Pac. 689. But see Beall v. Bekins Van & Storage Co., 33 Cal. App. 652, 166 Pac. 370, in which it was held that, under the more recent rulings on the subject of specifications, a specification was sufficient though its language was so general that it was most difficult to apply it to any finding or findings.

3. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Cormond v. United Railroads, 41 Cal. App. 683, 183 Pac. 218.

4. Millar v. Millar, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394 (a specification of the "insufficiency of the evidence to justify the findings, decision and judgment of the court" is too general); San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835; Eddelbuttel v. Durrell, 55 Cal. 277; Kelly v. Mack, 49 Cal. 523 (a statement that the evidence is insufficient to justify the decision is too general); Coleman v. Gilmore, 49 Cal. 340; Green v. Killey, 38 Cal. 201; Beans v. Emanuelli, 36 Cal. 117 (where the specification was "that the evidence offered and admitted on the trial of the cause is insufficient to justify the findings and judgment of the court herein"); Pralus v. Pacific Gold & S. Min. Co., 35 Cal. 30; Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 Pac. 166 (where the specification in this case was that the findings were not justified by the evidence. As against a contention that there was but one finding against the appellant, and that the specification should be held sufficient, it was held that there were two findings, and it could not be ascertained to which the specification referred).

5. Harding v. Vandewater, 40 Cal. 77.

jury.[6] Where, however, a single fact is found, it is sufficient in the specification to state that the finding is not justified by the evidence or is contrary thereto;[7] and such a specification of a particular fact involved in a general verdict would probably be held sufficient.[8] It has been held that if a finding involves several distinct propositions of fact, a specification that such finding (designating it by number) is contrary to the evidence is insufficient.[9] But if all the propositions except one relate to matters entirely immaterial and to questions as to which there is no dispute, and the respondent is not misled thereby, such a specification is sufficient.[10]

The earlier cases distinguished between findings of ultimate and findings of probative facts, and held that a specification which only says that the finding is not sustained by the evidence would be insufficient if the finding excepted to were the finding of an ultimate fact, but would be sufficient if the finding were that of a probative fact merely.[11] But this distinction has been abandoned, and

6. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Baird v. Peall, 92 Cal. 235, 28 Pac. 285; Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 Pac. 166. See Menk v. Home Ins. Co., 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117, holding that a general statement that there was no evidence which proved or tended to prove that the plaintiff at any time performed all or any of the conditions of the contract to be by him performed, is not sufficient.

7. Abbott v. Jack, 136 Cal. 510, 69 Pac. 257; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Strang v. Ryan, 46 Cal. 33. See Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479 (holding a specification sufficient as to a decision on settlement of an administrator's account).

8. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. See Morris v. De Celis, 51 Cal. 55, specification held sufficient that "there is no evidence to show that the title ever has been in the defendant."

9. Baird v. Peall, 92 Cal. 235, 28 Pac. 285; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419; Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Eddelbuttel v. Durrell, 55 Cal. 277. But see Strang v. Ryan, 46 Cal. 33, holding that a specification pointing to a specific finding confined to one or two facts and averring that it is not justified by the evidence is sufficient.

10. Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762.

11. See the following cases supporting this rule: De Molera v. Martin, 120 Cal. 544, 52 Pac. 825

now it is entirely immaterial whether a specification of a particular wherein the evidence is claimed to be insufficient to justify a verdict or decision points to a probative fact or to an ultimate fact.[12] It is now the rule that the specifications are sufficient when they are as specific as the findings themselves.[13] Hence, it has been held that a specification is sufficient when it points to a particular finding, or if the motion for a new trial is directed against a general verdict or an omnibus finding that all or certain allegations of the complaint or answer are true, or, if it be a judgment without findings, it need be no more specific than the issues distinctly made by the pleadings.[14]

§ 413. Specification Affirmative in Form.—In accordance with the earlier strictness with which the courts regarded specifications, it had often been held that a specification that the evidence shows certain facts to be true is insufficient standing alone.[15] In like manner a specification of what the court should have found was held insufficient because this was merely another method of stating what the evidence showed.[16] But these cases

(this case, which seems to be the authority most generally relied on in attacks upon the sufficiency of specifications to findings, was overruled in Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58; and see Kelly v. Mack, 49 Cal. 523).

12. Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58 (following the concurring opinion of Shaw, J., Angellotti, J., and Henshaw, J., in Bell v. Staacke, 141 Cal. 186, 74 Pac. 774).

13. Seymour v. Oelrichs, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58.

14. Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58 (overruling De Molera v. Martin, 120 Cal. 544, 52 Pac. 825, so far as holding to the contrary).

15. In re Strock, 128 Cal. 658, 61 Pac. 282; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Kumle v. Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. 634; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Williams v. Dennison, 94 Cal. 540, 29 Pac. 946; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Love v. Anchor Raisin Vineyard Co., 5 Cal. Unrep. 425, 45 Pac. 1044; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90.

16. Taylor v. Bell, 128 Cal. 306, 60 Pac. 853.

have been overruled, and in accordance with the liberal policy now adhered to, such a specification would be sufficient where the meaning is the same as if the specification had been negative in form. While the negative form is preferable, a positive form of statement is now permitted.[17] Thus, a specification, in an action for damages for injuries received by a servant, that "it clearly appears from the evidence that plaintiff knew that the work" was attended with danger is equivalent to a specification that the evidence is insufficient to show that the plaintiff did not know that the work was attended with danger.[18] So, also, a specification is sufficient which states that a finding that the defendant is the owner of land is unsupported by the evidence."[19] In like manner, a specification that the court erred in finding "certain facts" (designating them) is now deemed sufficient,[20] though formerly the rule was otherwise.[1]

§ 414. Setting Out Finding.—The finding excepted to may be designated by quoting it or the part excepted to. If in quoting a finding, matter not contained in it is stated, such matter may be rejected as surplusage where there is no doubt as to the finding referred to. If, in addition

17. Osborn v. Hopkins, 160 Cal. 501, Ann. Cas. 1913A, 413, 117 Pac. 519; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142; Estate of Yoakam, 103 Cal. 503, 37 Pac. 485; Eidinger v. Sigwart, 13 Cal. App. 667, 110 Pac. 521; Porter v. Counts, 6 Cal. App. 550, 92 Pac. 655. See McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86, holding a specification sufficient which states there was no evidence tending to show certain facts, but, on the contrary, the evidence shows certain other facts.

18. Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181.

19. Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58.

20. Porter v. Counts, 6 Cal. App. 550, 92 Pac. 655.

1. Gamble v. Tripp, 99 Cal. 223, 33 Pac. 851; Heilbron v. Centerville etc. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Coglan v. Beard, 67 Cal. 303, 7 Pac. 738; Barnhart v. Edwards, 5 Cal. Unrep. 558, 47 Pac. 251 (holding that an assignment that the court erred in finding a certain sum was due from the defendant to the plaintiff is not a specification of the particulars wherein the evidence is insufficient to sustain the finding).

thereto, the appellant attempts to designate the finding by number, the specification is not vitiated by a reference to a wrong number if the finding referred to is sufficiently clear.[2] Care must be observed, however, where the trial court makes a finding that an allegation in the complaint is untrue, negativing, in this, the precise words of the complaint. For example, where in an action to set aside a deed the plaintiff alleges that he signed the deed without reading it, and the court finds "that it is not true that the plaintiff signed the deed without reading it," a specification is insufficient which paraphrases the court's finding and states that there is no evidence to justify the finding that the plaintiff signed the deed without reading it. Such a specification does not state that the finding is not sustained by the evidence, but goes over the finding and states that the allegation in the complaint is not sustained by the evidence. In such case the plaintiff in effect agrees with the court that his allegation was not proved.[3]

K. BRIEFS.

I. GENERAL PRINCIPLES.

§ 415. Definition and Purpose.—A brief of points and authorities upon appeal is a printed document to aid the appellate court in considering the case, as well as to advise opposing counsel of the questions to be presented and the authorities relied upon in reference to them. It is the vehicle of counsel to convey to the court the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied and the application he desires made of it by the court.[4] It is distinct from a bill of exceptions or other document, and

2. Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762. See supra, § 412, as to referring to finding by number.

3. Crow v. Crow, 168 Cal. 607, 143 Pac. 689.

4. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630.

the irregular interpolation of points and authorities in a bill of exceptions or document purporting to be such will not suffice as an opening brief on appeal.[5]

§ 416. Necessity for.—A brief is required on the part of an appellant to inform the court of facts of the particular case and the points relied on for reversal. If no brief has been filed in behalf of the appellant and there is no appearance on his behalf at the oral argument, the appellate court is not called upon to give any consideration to his appeal.[6] It will not perform the duty of counsel by examining the record to ascertain if possible error may not have intervened in the court below, but will dismiss the appeal upon motion of the respondent,[7] or, in the absence of such motion, it will affirm the judgment or order of the court below without an examination of the record.[8] Frequently, though, the court, in disposing

5. Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297.

6. Placerville Gold Min. Co. v. Beal, 168 Cal. 682, 144 Pac. 748.

7. See infra, §§ 430, 441.

8. Sewell v. Christie, 163 Cal. 76, 124 Pac. 713; Scott v. Sowden, 2 Cal. Unrep. 842, 16 Pac. 768; Drexler v. Seal Rock Tobacco Co., 78 Cal. 624, 21 Pac. 372; Peek v. Peek, 75 Cal. 298, 17 Pac. 213; Faris v. Lampson, 73 Cal. 190, 14 Pac. 674; Whitman v. Hay (Cal.), 9 Pac. 99; Easterby v. City of Napa (Cal.), 8 Pac. 600; Whitmore v. Henderson (Cal.), 7 Pac. 707; Cleghorn v. Cleghorn (Cal.), 7 Pac. 646; McCauley v. Cunningham (Cal.), 7 Pac. 646; Whitmore v. Henderson (Cal.), 7 Pac. 646; In re Laswell (Cal.), 4 Pac. 886; Estate of Montgomery, 59 Cal. 583; Brewster v. Johnson, 51 Cal. 222 (affirming judgment with twenty-five per cent damages); Hickinbotham v. Monroe, 28 Cal. 489; Hutton v. Reed, 25 Cal. 478; Holm v. Roach, 25 Cal. 37; Edmondson v. Alameda County, 24 Cal. 349; Sayre v. Smith, 11 Cal. 129; Mokelumne Hill Canal & Mining Co. v. Woodbury, 10 Cal. 187; Brown v. Tolles, 7 Cal. 398; Rothrock v. Baldwin, 7 Cal. Unrep. 338, 91 Pac. 1014 (an examination of the record suggests no error); Romine v. Cralle, 3 Cal. Unrep. 417, 27 Pac. 20 ("We have, however, examined the record, and in our opinion no error prejudicial to the appellant is therein shown"); Hanson v. Voll, 3 Cal. Unrep. 117, 21 Pac. 971; Purdy v. Rahl, 3 Cal. Unrep. 106, 21 Pac. 971; Dalmazzo v. Drysdale, 3 Cal. Unrep. 84, 21 Pac. 553; Hughes v. Thompson, 2 Cal. Unrep. 841, 16 Pac. 532; Hite Gold Quartz Co. v. Stermont Silver Min. Co., 2 Cal. Unrep. 481, 7 Pac. 120; Keating v. Edgar, 2 Cal. Unrep. 226, 1 Pac. 155 (the appellate court is justified in treating

of the appeal upon this ground states that its examination of the record discloses no error.[9] It has been held that the insolvency of the respondent does not excuse the appellant from filing his brief.[10]

A brief is required of the respondent for the purpose of sustaining the action of the trial court. Formerly, it was the rule that in the absence of a printed brief or oral argument on the part of the respondent, the appellate court would assume without looking into the record, that the points urged by the appellant were well taken.[11] But this rule is no longer applicable in its full extent, since the amendment of section 4½ of article VI of the constitution. Under this provision it is incumbent upon an appellant proceeding under the alternative method to print in his brief such portions of the record as he deems essential to a correct understanding of the appeal, and while in the absence of any brief on the part of the respondent the appeal may be determined upon those portions of the record printed in the appellant's brief, it is incumbent upon him to show that the error resulted in a miscarriage of justice, even in the absence of any brief or appearance on behalf of the respondent.[12]

the appeal as abandoned); Chapman v. Wade, 1 Cal. Unrep. 158; Collins v. John Roberts Co., 29 Cal. App. Dec. 448, 183 Pac. 829; Schultheiss Bros. Co. v. Steinberg, 29 Cal. App. Dec. 140, 183 Pac. 347; Solomon v. Justice's Court, 36 Cal. App. 152, 171 Pac. 817; McNutt v. Pabst, 23 Cal. App. 232, 143 Pac. 68; Delger v. Jacobs, 18 Cal. App. 698, 124 Pac. 95.

On an appeal from an order granting a new trial, where no briefs are filed and there is nothing to show on what grounds the court granted the motion, the order will be presumed correct and affirmed. Hughes v. Thompson, 2 Cal. Unrep. 841, 16 Pac. 532.

9. Placerville Gold Min. Co. v. Beal, 168 Cal. 682, 144 Pac. 748.

10. Suman v. Archibald, 116 Cal. 41, 47 Pac. 865.

11. Lawrence v. Johnson, 131 Cal. 175, 63 Pac. 176; Mountain Tunnel Gravel Min. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872; Davis v. Hart, 103 Cal. 530, 37 Pac. 486; Richter v. Fresno Canal & Irr. Co., 101 Cal. 582, 36 Pac. 96; Williston v. Perkins, 51 Cal. 554; Mullia v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008; Bullock v. Bullock, 29 Cal. App. 463, 155 Pac. 1009.

12. Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 Pac. 158.

§ 417. Compliance With Supreme Court Rules.—The right of an appellant to be heard depends, in the first place, upon his compliance with the Code of Civil Procedure in taking his appeal, as well in the manner as within the time provided by the code. After his appeal has been taken his right to a consideration thereof by a court of review depends upon his compliance with the rules of court in perfecting his appeal by filing his transcript, and, thereafter, his points and authorities in accordance with and within the time specified in those rules.[13] The constitution authorizes the supreme court to make and adopt rules not inconsistent with law for the government of the supreme court and of the district courts of appeal and of the officers thereof, and for regulating the practice in said courts.[14] Rules of practice made pursuant to this provision have the force of positive law so far as the rights of the parties are concerned, provided such rules do not conflict with any act of the legislature.[15] They confer rights which may be enforced by litigants,[16] and will be strictly enforced where they are of such a nature that important rights are given by them.[17]

13. Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878. See Fisher v. Western Fuse & Explosives Co., 12 Cal. App. 299, 107 Pac. 332, holding the rules of the supreme court to be binding upon the district court of appeal.

14. Const., art. VI, § 4; San Joaquin & K. R. Canal & Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 378 (holding it is not the duty of the district court of appeal to formulate and promulgate rules).

15. Brooks v. Union Trust & R. Co., 146 Cal. 134, 79 Pac. 843; Wood v. Mesmer, 39 Cal. App. 108, 178 Pac. 314.

16. McCabe v. Healey, 139 Cal. 30, 72 Pac. 359; Yolo Water & Power Co. v. Edwards, 31 Cal. App. Dec. 126, 187 Pac. 755; Wood v. Mesmer, 39 Cal. App. 108, 178 Pac. 314; Borgmeyer v. Solomon, 39 Cal. App. 106, 178 Pac. 544; Barnhart v. Conley, 17 Cal. App. 230, 119 Pac. 200 (time for filing brief). As to rules generally, see COURTS.

17. Brooks v. Union Trust & R. Co., 146 Cal. 134, 79 Pac. 843. In order that the court may control its calendars and dispose of its business in an orderly and convenient manner, a compliance with the supreme court rules will be exacted. Long v. American Surety Co., 11 Cal. App. 94, 103 Pac. 1094.

Relaxation of rules.—While a compliance with the rules prescribed by the court is necessary in general, they are but a means to accomplish the ends of justice, and it is always in the power of a court to suspend its rules or to except a particular case from their operation, whenever the purposes of justice require it.[18] The court may, upon proper terms, allow a departure from its rules in cases where it is shown that by unavoidable accident or excusable mistake parties have been prevented from observing them; and where it appears that substantial injury will be inflicted by their enforcement. Ordinarily, though, the court is reluctant to vary in the least from the exact practice prescribed.[19]

II. FORM AND REQUISITES.

§ 418. **In General**—*Opening brief.*—The appellant's opening brief is required to be printed,[20] and to contain a statement of the essential facts of his case;[1] a statement of the questions of law involved in the appeal and to be decided by the court,[2] with a reference to the page of the transcript and folio where the erroneous ruling is to be found,[3] the law he would have applied,[4] and the application he desires made of it by the court.[5] An appellant should not inject into his brief a discussion of facts outside of the record. Such statements cannot be considered by the court in arriving at a decision.[6] But they may be

18. Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Pickett v. Wallace, 54 Cal. 147. See infra, § 441.

19. Brooks v. Union Trust & Realty Co., 146 Cal. 134, 79 Pac. 843; McCahan v. McCahan, 31 Cal. App. Dec. 1107, 190 Pac. 460. See infra, § 431. See COURTS.

20. Supreme court rule II, subd. 4; McCahan v. McCahan, 31 Cal. App. Dec. 1107, 190 Pac. 460.

See supreme court rule XVIII, as to style and form.

1. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630.

2. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630. See infra, § 419.

3. See infra, § 422.

4. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630. See infra, § 423.

5. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630.

6. Randall v. Allen, 180 Cal. 298, 180 Pac. 941; Horton v. City of Los Angeles, 119 Cal. 602, 51 Pac. 956; Schaefer v. Dinwiddie, 30 Cal. App. Dec. 627, 186 Pac. 617 (a copy of

considered to point the discussion,[7] and if a party appends to his brief a document which is not in the record, he cannot complain if the court should consider the document as against him.[8]

Respondent's brief.—Statements of facts contained in the brief of an appellant are presumably correct, and if there is any error in them, it is the duty of the respondent to point out what essential statements are omitted and to state them as an addition to appellant's statement, with references to the record. Under section 953c of the Code of Civil Procedure requiring the printing in the brief of such portions of the record as are pertinent, if the respondent files no brief, the appellate court will accept the evidence as set out in the appellant's brief as true and correct.[9] Although the appellate court, when reviewing the action of a superior court granting an application for an order, is not limited to the reasons specified by the court in its order,[10] the failure of the respondent in his brief to advance other reasons in support of the order authorizes the court to assume no other valid ground exists.[11]

§ 419. **Pointing Out Errors.**—While counsel for the appellant is entitled to be heard upon every error which he deems it his duty to raise as ground for reversal,[12] he should point out to the court which of the many ob-

a pleading in a brief is not entitled to consideration where such pleading nowhere appears in the authenticated transcript); Rich v. Moss Beach Realty Co., 30 Cal. App. Dec. 301, 185 Pac. 859; Brizzolara v. Sbrana, 29 Cal. App. 471, 156 Pac. 1198; Conde v. Sweeney, 14 Cal. App. 20, 110 Pac. 973; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719.

7. Randall v. Allen, 180 Cal. 298, 180 Pac. 941.

8. Estate of Cahill, 74 Cal. 52, 15 Pac. 364; Mott v. Reyes, 45 Cal. 379.

9. Beckett v. Stuart, 23 Cal. App. 373, 138 Pac. 115. See supra, §§ 359–365.

10. See infra, §§ 476–479.

11. Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507; Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 178.

12. Estate of Montgomery, 59 Cal. 583.

jections and exceptions usually found in the transcript he wishes to have the court review, and point out definitely wherein the action of the court is deemed erroneous.[13] The appellate court cannot be expected to prosecute an independent inquiry for errors upon which the appellant may possibly be relying. It will notice only those assignments pointed out in the brief. All others are deemed to have been waived or abandoned.[14]

13. Hibernia Sav. & Loan Soc. v. Farnham, 153 Cal. 578, 126 Am. St. Rep. 129, 96 Pac. 9; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (any deficiency in the franchise of the street railroad must be pointed out); Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225; West v. Crawford, 80 Cal. 19, 21 Pac. 1123; Souza v. Joseph, 22 Cal. App. 179, 133 Pac. 981; Carley v. Vallecita Min. Co., 16 Cal. App. 781, 117 Pac. 1037; Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672. See infra, § 424, as to pointing out errors for the first time in reply brief. And see infra, § 464, as to raising point for first time in petition for rehearing.

14. Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 175 Pac. 690; Roberts v. Krafts, 141 Cal. 20, 74 Pac. 281; Rauer's Law & Collection Co. v. Gilleran, 138 Cal. 352, 71 Pac. 445 (where an appeal is taken from a judgment and an order and counsel in his brief makes no reference to the appeal from the judgment, it will be regarded as abandoned and will not be reviewed); City Savings Bank v. Enos, 135 Cal. 167, 67 Pac. 52; Bassett v. Fairchild, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; Id., 6 Cal. Unrep. 458, 61 Pac. 791; Trabing v. California Nav. etc. Co., 121 Cal. 137, 53 Pac. 644 (where the appellant considers a special demurrer only, it will be presumed the complaint is sufficient as against the general demurrer); Wilkinson v. Parrott, 32 Cal. 102; Buena Vista Oil Co. v. Park Bank, 39 Cal. App. 710, 180 Pac. 12 (where, notwithstanding the many specifications for insufficiency of evidence, the appellants' brief complains of but one finding, the other specifications may be deemed abandoned); A. B. Field & Co. v. Haven, 36 Cal. App. 669, 173 Pac. 108; Irvine & Muir Lumber Co. v. Holmes, 26 Cal. App. 453, 147 Pac. 229; Elsom v. Moore, 11 Cal. App. 377, 105 Pac. 271 ("We should not be asked to search through the record for errors which we may suspect counsel to be relying upon"); Patterson v. Rubenstein, 6 Cal. App. 440, 92 Pac. 401 (quoting People v. McLean, 135 Cal. 306, 67 Pac. 770); Bully Hill C. Min. & S. Co. v. Bruson, 4 Cal. App. 180, 87 Pac. 237; Lewis v. San Francisco, 2 Cal. App. 112, 82 Pac. 1106 (on petition for modification of judgment).

Stating points separately.—Rule VIII of the supreme court provides in part:

"The briefs must present each point separately under an appropriate subheading, showing the nature of the question to be presented."

§ 420. Limitation on Rule.—The rule requiring an appellant to point out errors relied upon is not a hard-and-fast one. It is designed for the convenience and aid of the reviewing courts, to save them the time and trouble of searching the record of a case for the purpose of determining whether the complaints made by counsel are well founded or not. The court is at liberty to decide a case upon any points that its proper decision may require, whether taken by counsel or not.[15] If the court desires to act upon the presumption of waiver of questions not pointed out in the briefs, it may do so. Conversely, if it is disposed to take up such points at the expense of labor and trouble which the attorneys should have attended to, there is no reason why it should not do so.[16] The court may therefore depart from the rule where an alleged error is specified in the assignments of error, and it is apparent from an examination of the record that it is prejudicial,[17] or to determine whether an order of the trial court can be supported upon any ground.[18] And if it should be brought to the attention of the court before its judgment had become final that upon the face of the record the judgment appealed from was in contravention of some statute or well-established rule of law, it would be justified in setting aside its judgment of affirmance, even though the appellant had not pointed out the objection, or

15. Hibernia Savings & Loan Soc. v. Farnham, 153 Cal. 578, 126 Am. St. Rep. 129, 96 Pac. 9; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Prost v. More, 40 Cal. 347; Hubbard v. Sullivan, 18 Cal. 508 (on petition for rehearing); Lewis v. San Francisco, 2 Cal. App. 112, 82 Pac. 1106 (on petition for modification of judgment).

16. Hill v. Barner, 8 Cal. App. 58, 96 Pac. 111.

17. Hill v. Barner, 8 Cal. App. 58, 96 Pac. 111.

18. Smith v. Royer, 181 Cal. 165, 183 Pac. 660.

its attention had not been called to the matter until after it had filed its opinion. This is not a rule, however, which can be invoked by the respondent as a matter of right.[19]

§ 421. Application of Rule.—Where error in excluding testimony to prove a fact is relied on, the appellant must point out the evidence by which he sought to prove the fact.[20] When it is contended that the evidence does not sustain the findings, the appellant must point out in his brief the evidence,[1] and the particular finding or findings claimed to be unsupported,[2] and he must show wherein the evidence does not sustain the findings.[3] Otherwise, as the finding of the trial court when brought up on appeal is to be deemed correct, rather than erroneous, it will be upheld by the court.[4]

An omnibus objection that each and every ruling of the court below, which was made the object of objection and exception, was erroneous, which cites many folios of the transcript but does not point out why error is claimed as to any of the assignments, may be ignored.[5] And where counsel contents himself with saying he does not waive other errors assigned but not discussed, and asks the court to examine them as set forth in the specification

19. Lewis v. San Francisco, 2 Cal. App. 112, 82 Pac. 1106, on petition for a modification of judgment. See infra, § 585, as to vacation of judgment of appellate court.

20. Stewart v. Whittemore, 3 Cal. App. 213, 84 Pac. 841.

1. Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416.

2. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

3. Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Leo J. McLaughlin Co. v. Phillips, 31 Cal. App. Dec. 818, 189 Pac. 788; Tait v. McInnes, 3 Cal. App. 155, 84 Pac. 674.

4. Brison v. Brison, 90 Cal. 323, 27 Pac. 186.

5. Whyte v. Rosencrantz, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436. See, also, Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703, where counsel made a general objection that the court erred in all respects to which exceptions were taken as described in the record.

of errors, the appellate court is justified in the conclusion that they are not important.[6]

Error in giving or refusing instructions.—When an appellant complains of error in the giving or refusing of instructions, he should point out the error in his brief. It is insufficient merely to state that the exceptions to the charge of the court were well taken,[7] or that the court erred in refusing to give instructions asked on the part of the appellant.[8] The court cannot be expected to search through the instructions given or offered to find those to which the general discourse of the appellant may apply.[9] Nor is it sufficient to state that the court erred in giving a particular instruction, designating it by number. In fairness to the court and to opposing counsel, the appellant should not only indicate instructions objected to, but he should also point out in what respect the instructions questioned are erroneous.[10] In the case of a refusal of instructions the appellant should point out and state the proposition of law requested,[11] and call attention to

6. Whellock v Godfrey, 100 Cal. 578, 35 Pac. 317.

7. Holloway v. McNear, 81 Cal. 154, 22 Pac. 514; Gillaspie v. Hagens, 90 Cal. 90, 27 Pac. 34.

8. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326; Holloway v. McNear, 81 Cal. 154, 22 Pac. 514; Elsom v. Moore, 11 Cal. App. 377, 105 Pac. 271.

When all the instructions asked are set out in the transcript, an objection that the instructions asked were proper and were not covered by the court's charge to the jury is too general. The proper instructions said to have been asked and not substantially given should be specified by counsel. Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569.

9. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326; Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

10. Dale v. Purvis, 78 Cal. 113, 20 Pac. 296; Elsom v. Moore, 11 Cal. App. 377, 105 Pac. 271, where counsel stated: "The court gave all of the instructions requested by defendants, each of which, when applied to the facts of this case, is erroneous."

A statement in the brief of the appellant that the specifications in his statement sufficiently indicate the instructions objected to is insufficient where the instructions are numerous and voluminous. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

11. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326; Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569.

the error caused by the refusal and the reasons why they should have been given.[12]

§ 422. Reference to Transcript.—In pointing out a ruling claimed to be erroneous, counsel in his brief should refer to the page of the transcript and folio where the ruling is to be found.[13] If he does not see fit to do so, it will be assumed that he has not deemed the rulings of sufficient merit or importance to undertake the task. In any event, the appellate court will not assume the burden of discovering the ruling.[14] This rule is applicable also to the respondent. And where he does not either orally or in his brief point out where in a voluminous record evidence may be found to sustain findings assailed as being without support, the appellate court will assume there is no such evidence.[15]

§ 423. Argument and Authority.—An appellate court cannot assume the task of discovering the error in a ruling,[16] and it is the duty of counsel by argument and the citation of authority to show the reasons why the rulings complained of are erroneous.[17] Contentions supported neither by argument nor by citation of authority are deemed to be without foundation,[18] and to have been abandoned.[19] Such contentions will not be considered by

12. Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326.

13. Dauphiny v. Buhne, 153 Cal. 757, 126 Am. St. Rep. 136, 96 Pac. 880; Bell v. Staacke, 151 Cal. 544, 91 Pac. 322; City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224; Tait v. McInnes, 3 Cal. App. 155, 84 Pac. 674.

14. Dauphiny v. Buhne, 153 Cal. 757, 126 Am. St. Rep. 136, 96 Pac. 880.

15. Mountain Tunnel Gravel Min. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Mullia v. Ye Planry Bldg. Co., 32 Cal. App. 6, 161 Pac. 1008. See supra, § 416.

16. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124.

17. Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777; National Bank v. Mulford, 17 Cal. App. 551, 120 Pac. 446 (quoting People v. McLean, 135 Cal. 306, 67 Pac. 771).

18. Bell v. Southern Pac. R. R. Co., 144 Cal. 560, 77 Pac. 1124.

19. Bonner v. Quackenbush, 51 Cal. 180; McGee v. Hoffman, 31 Cal. App. Dec. 727, 189 Pac. 298.

an appellate court, unless they are embraced in a discussion of other points.[20] This has been repeatedly declared by the courts.[1] A party complaining of error and seeking

20. Where the giving of certain instructions for the plaintiff and the refusal of other instructions on the same subject asked by the defendant are duly excepted to, a discussion in appellant's brief confined to the ruling refusing the instructions asked by him is not a waiver of the exception in giving the plaintiff's instructions, if it appears that the argument made in the brief necessarily involves a similar argument on the instructions given. Shade v. Sisson Mill & Lumber Co., 115 Cal. 357, 47 Pac. 135.

1. Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672 (error in refusing instruction); California Portland Cement Co. v. Boone, 181 Cal. 35, 183 Pac. 447; Baker v. Smith-Booth-Usher Co., 180 Cal. 309, 181 Pac. 56; Thomas v. Hacker, 179 Cal. 731, 178 Pac. 855 (error as to admission of evidence); Vance v. Gilbert, 178 Cal. 574, 174 Pac. 42; Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680; Born v. Castle, 175 Cal. 680, 167 Pac. 138; Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 Pac. 687 (where counsel contented himself with a bare statement that "the instruction in question should have been given"); Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Clark v. Kelley, 163 Cal. 207, 124 Pac. 846; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817; Gray v. Walker, 157 Cal. 381, 108 Pac. 278 (where counsel merely stated that "in deciding these objections against the defendant the court erred"); Pigeon v. W. P. Fuller & Co., 156 Cal. 691, 105 Pac. 976; Bell v. Staacke, 151 Cal. 544, 91 Pac. 322; Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777; Bird v. Potter, 146 Cal. 286, 79 Pac. 970; Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106 (specification not argued); Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107; Neylan v. Green, 82 Cal. 128, 23 Pac. 42; Bonner v. Quackenbush, 51 Cal. 180; Rogers v. Ponet, 21 Cal. App. 577, 132 Pac. 851 (error as to admission of evidence); Brown v. Tolles, 7 Cal. 398; Bar Due v. Cox, 32 Cal. App. Dec. 381, 190 Pac. 1056 (a brief merely quoting verbatim the reporter's transcript of a motion for nonsuit, and the court's ruling, without a single comment, presents no question for review. The same is true of a mere statement that there is "no substantial conflict" in the testimony); McGee v. Hoffman, 31 Cal. App. Dec. 727, 189 Pac. 298; Telander v. Tujunga Water & Power Co., 30 Cal. App. Dec. 148, 185 Pac. 504 (where the only reference was by number as designated in the transcript as exceptions); Lawson v. Steinbeck, 30 Cal. App. Dec. 802, 186 Pac. 842; Spellacy v. Young, 30 Cal. App. Dec. 446, 186 Pac. 368; Murdough v. Murdough, 23 Cal. App. 179, 137 Pac. 267; Bowles v. Hickson, 22 Cal. App. 264, 133 Pac.

a reversal of a judgment or order because thereof should show wherein the error consists.[2] The appellate court can hardly be expected to prosecute an independent inquiry in order to find out reasons for or against the rulings of the trial court.[3] Moreover, the citation of cases as authority without a personal knowledge of their pertinency is improper.[4]

§ 424. **Scope of Reply Brief.**—In fairness to the court and to counsel for the respondents, every point relied on for research should be stated and argued in the opening brief for the appellant, and should not be presented for the first time in the reply brief. Points so presented will be passed over by the courts as a general rule,[5] unless

1149; Rogers v. Ponet, 21 Cal. App. 577, 132 Pac. 851; Vujacich v. Southern Commercial Co., 21 Cal. App. 439, 132 Pac. 80; Madeira v. Sonoma Magnesite Co., 20 Cal. App. 719, 130 Pac. 175; National Bank v. Mulford, 17 Cal. App. 551, 120 Pac. 446; Elsom v. Moore, 11 Cal. App. 377, 105 Pac. 271.

2. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (where counsel fail to point out the issue upon which there is no finding, the appellate court will not review the error alleged); Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225; Brown v. Tolles, 7 Cal. 398.

3. Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223.

4. Reference to innumerable cases from digests without personal examination is, of course, condemned. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630.

5. Thompson v. Koeller, 60 Cal. Dec. 167, 191 Pac. 927; Hibernia Savings & Loan Soc. v. Farnham, 153 Cal. 578, 126 Am. St. Rep. 129, 96 Pac. 9; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712 (holding the point not a new point raised in the reply brief where the appellant merely corrects a citation of a city charter applicable to the case); Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Hihn v. Courtis, 31 Cal. 398 (per Sawyer, J., on petition for rehearing); Mott v. Wright, 29 Cal. App. Dec. 675, 30 Cal. App. Dec. 36, 184 Pac. 517; Thompson v. Koeller, 30 Cal. App. Dec. 582; Camp v. Boyd, 41 Cal. App. 83, 182 Pac. 60; Porter v. Anglo & London P. N. Bank, 36 Cal. App. 191, 171 Pac. 845; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Glasspoole v. Pacific Lumber Co., 22 Cal. App. 338, 134 Pac. 349; Bacigalupi v. Phoenix Bldg. & Const. Co., 14 Cal. App. 632, 112 Pac. 892; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672; Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713 (on denial of rehearing); Maxwell v. Fresno City Ry. Co., 4 Cal. App. 745, 89 Pac. 367; Lewis v. San Francisco, 2 Cal. App. 112, 82 Pac. 1106.

good reason appears for the failure sooner to present them. However, a point may be made for the first time in the closing brief when made in response to a point in the brief of the respondent.[6] And as the court is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not, an appellant, upon application showing meritorious reasons, may be allowed to discuss new points in his final brief. Such application may be based upon sickness, inadvertence or other excusable neglect.[7] While an appellate court is not obliged to consider points made for the first time in a reply brief, it may nevertheless examine such points.[8]

§ 425. **Brevity.**—Brevity in the brief and argument of counsel is often commended.[9] What the court needs for a proper consideration of a case is a clear, brief statement of the point made, with a citation of authorities bearing directly upon it. Long quotations from authorities are unnecessary, although quotations containing brief statements of the points relied upon are proper.[10] While simplicity of statement in the brief of counsel has always been approved, the effort in this direction should not go so far as to eliminate or exclude all specification or mention of the errors relied upon for a reversal. The simplicity desired is that which avoids prolixity, verbosity and repetition; which omits theoretical disquisitions on

6. Davidson v. Raffy, 28 Cal. App. Dec. 525, 819, 180 Pac. 830 (on petition for modification).

7. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Bacigalupi v. Phoenix Bldg. & Const. Co., 14 Cal. App. 632, 112 Pac. 892 (only when "cogent reasons" are given for failure to present the point in the opening brief will the point be considered).

8. Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672.

9. Finney v. Curtis, 78 Cal. 498, 21 Pac. 120; Holloway v. McNear, 81 Cal. 154, 22 Pac. 514; Dale v. Purvis, 78 Cal. 113, 20 Pac. 296; Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630.

10. Finney v. Curtis, 78 Cal. 498, 21 Pac. 120.

abstract principles of law, needless presentation of questions of fact as to which the action of the trial court is final, the citation of innumerable authorities indicative of an examination of the subject which has never passed the digest stage, and the like. It must be assumed that the appellate court does not know the facts of the particular case or the special errors relied on for reversal, and these must be clearly pointed out, even at the hazard of encroaching upon an ideal simplicity of statement.[11] It has been said that no brief at all is worse than one too voluminous.[12]

§ 426. Scandal and Impertinence.—To file a brief upon appeal containing disrespectful and contemptuous references to and insinuations against the trial court, and the judge thereof, is not only a violation of the statute requiring attorneys "to maintain the respect due to the courts of justice and judicial officers,"[13] but it is also a contempt of the appellate court,[14] for which the brief may be stricken from the files.[15] The party represented by counsel committing the offense ought not ordinarily to be deprived of any of his legal rights, however, and the ap-

11. Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630.

Brevity is overdone where counsel satisfies himself with a mere statement that a ruling is erroneous, without giving any reason why the ruling is erroneous. Dale v. Purvis, 78 Cal. 113, 20 Pac. 296.

12. Brown v. Tolles, 7 Cal. 398.

13. Code Civ. Proc., § 282.

14. Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531; Friedlander v. Sumner Gold & Silver Min. Co., 61 Cal. 116; First Nat. Bank of Auburn v. Superior Court, 12 Cal. App. 335, 107 Pac. 322.

15. Estate of Randall, 177 Cal. 363, 170 Pac. 835; Gage v. Gunther, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710; Duncan v. Times-Mirror Co. (Cal.), 52 Pac. 651 (holding brief not of scandalous nature); San Diego Water Co. v. City of San Diego, 117 Cal. 556, 49 Pac. 582; Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531; Friedlander v. Sumner G. & S. Min. Co., 61 Cal. 116; Cramer v. Tittel, 3 Cal. Unrep. 80, 21 Pac. 750; Miller v. Childs, 28 Cal. App. 478, 152 Pac. 972 (refusing to strike brief because the language, while somewhat intemperate, did not show that counsel intended any reflection upon the integrity of the trial judge).

pellate court may allow a proper brief to be filed,[16] or reserve the power to examine the transcript to ascertain if errors occurred in the court below.[17]

§ 427. Miscellaneous Matters—*Chain of title.*—When a record contains many deeds and a case requires an examination of a chain of title, it is the duty of counsel to put an abstract or tabular statement of the chain of title in their briefs.[18]

Printing portions of record.—When the record is prepared pursuant to section 953a of the code, it is required that the parties in filing briefs print therein, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court. This rule is applicable both to appellants and respondents.[19]

Index to brief and table of cases.—Rule VIII of the supreme court provides for the alphabetical indexing of briefs.

"For any failure to observe this rule which is found to obstruct the examination of the record the court may, of its own motion, order the proper index to be supplied, or strike out the brief, or for failure of the appellant, dismiss the appeal."[20]

Admissions.—Admissions of counsel in his brief can be considered the same as an admission made in the trial of a cause. But all the terms of a stipulation must be considered. The court has no right to accept a part and reject a part.[1]

16. Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531; Cramer v. Tittel, 3 Cal. Unrep. 80, 21 Pac. 750.

17. Friedlander v. Sumner G. & S. Min. Co., 61 Cal. 116.

18. Wilcoxson v. Miller, 49 Cal. 193.

19. See Code Civ. Proc., § 953c, and supra, § 359 et seq.

20. See McCahan v. McCahan, 31 Cal. App. Dec. 1107, 190 Pac. 460, in which the court did not dismiss the appeal or strike the brief for a violation of the rule because of the nature of the case and the situation of the appellant.

1. Bradley v. Clark, 133 Cal. 196, 65 Pac. 395. See Harmon v. Keogh, 41 Cal. App. 773, 183 Pac. 201, where the appellant in his brief conceded that the complaint sustained the judgment if the evidence was sufficient.

III. SERVICE AND FILING.

§ 428. **In General.**—A party preparing a brief should file the same number of copies as are required for other papers.[2] He should serve a copy upon the adverse party,[3] deposit a copy with the clerk of the court from which the appeal is taken, for the judge who presided at the trial of the cause in the lower court,[4] and file the original accompanied with the remaining copies within the time limited by the rules of the supreme court.[5]

§ 429. **Time for Filing.**—With respect to the time to file briefs, subdivision 4 of rule II of the supreme court provides as follows:

"Within thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities, with proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appeared separately in the superior court.[6] Within thirty days after the service of the appellant's points and authorities, the respondent shall serve and file his printed points and authorities, and within twenty days after service of respondent's points the appellant may serve and file a reply."

Subdivision 2 of rule XII provides that:

"The time for filing points and authorities, in cases where the record is printed by the clerk, shall commence to run from the filing of the printed copy of the transcript."

2. Supreme court rule II, subd. 6. McCahan v. McCahan, 31 Cal. App. Dec. 1107, 190 Pac. 460. See supra, § 358.

3. People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381 (holding an intervener to be a respondent and entitled to service of a copy of the brief); Brizzolara v. Sbrana, 29 Cal. App. 471, 156 Pac. 1198.

4. Supreme court rule II, subd. 7.

5. See infra, § 429.

6. Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; Paramore v. Colby, 37 Cal. App. 648, 174 Pac. 677.

Computation of time.—If the last day in which to file a brief falls on a holiday, the party has to and including the following business day.[7]

§ 430. Effect of Noncompliance.—The effect of a noncompliance by an appellant with the rule prescribing the time for filing briefs is declared in rule V, which provides:

"If the . . . appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If . . . the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient to answer to the motion."[8]

These rules as to time for filing briefs confer rights which may be enforced by litigants.[9] A respondent has a right to have the appeal dismissed if the appellant's brief is not filed within the time limited and before notice of motion to dismiss is given, and the appellate courts in a number of cases have dismissed appeals for default in this respect.[10] The right of a respondent to a dismissal is

7. Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co., 13 Cal. App. 115, 109 Pac. 36. See Code Civ. Proc., § 12; and see PROCESS.

8. See infra, § 443.

9. See supra, § 417.

10. Egressy v. Stansbury, 149 Cal. 392, 87 Pac. 280; Coats v. Coats, 146 Cal. 443, 80 Pac. 694; McCabe v. Healey, 139 Cal. 30, 72 Pac. 359; Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148; Pilger v. Strassman, 119 Cal. 691, 52 Pac. 40; Suman v. Archibald, 116 Cal. 41, 47 Pac. 865; McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777; Sorensen v. Dorris (Cal.), 37 Pac. 870; People v. O'Brien, 39 Cal. 686; Fowler v. Harbin, 23 Cal. 630 (where there is no statement on appeal, no assignment of errors and no brief, the appeal will be dismissed); Sayre v. Smith, 11 Cal. 129 (explained in Hutton v. Reed, 25 Cal. 478); People v. Comedo, 11 Cal. 70; Squires v. Foorman, 10 Cal. 298 (explained in Hutton v. Reed, 25 Cal. 478); Brooks, Clark & Co. v. Townsend, 4 Cal. 286 (dismissed for want of an assignment of errors); Markham v. Fowler, 2 Cal. Unrep. 853, 17 Pac. 228; Havens v. Dale, 1 Cal. Unrep. 237 (where there was no statement on appeal and no brief); Pierce v. Employers' Indemnity Exchange, 33 Cal. App. 98, 164 Pac. 403; Barnhart v. Conley, 17 Cal. App. 230, 119 Pac. 200; Long v. American Surety Co., 11 Cal. App. 94, 103 Pac. 1094; Estate of Shiveley, 11 Cal. App. 14, 103 Pac. 959. See Soo Hong Song v. United States, 236 Fed. 1022; In re

controlled by the facts existing at the time the notice of motion is given. If there is no brief on file at that time the appeal will be dismissed, notwithstanding the subsequent filing of such brief.[11] If there is a brief on file at that time the respondent is not entitled to a dismissal,[12] or to an affirmance of the judgment without an examination of the merits, although it has been held in such case that the court, in its discretion, may refuse the appellant the privilege of making an oral argument.[13] It has also been held that a brief filed after the expiration of the time limited without leave of court or consent of counsel may be allowed to remain as an argument on the merits only.[14]

Noncompliance by respondent.—As to the effect of noncompliance by the respondent, rule V of the supreme court provides that:

"If the respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the appellant's brief."

The appellant is not absolutely entitled under this rule to an immediate submission of the case for decision, but he is entitled to have the case placed upon the submission calendar, to be submitted in due course when the business of the court shall permit such submission.[15]

§ 431. Relieving from Default.—While the rules of the supreme court requiring briefs on appeal within the time

Kupfer Corporation, 236 Fed. 1019, 149 C. C. A. 667, under rule XXIV of the circuit court of appeals.

11. McCabe v. Healey, 139 Cal. 30, 72 Pac. 359; Pierce v. Employers' Indemnity Exchange, 33 Cal. App. 98, 164 Pac. 403; Barnhart v. Conley, 17 Cal. App. 230, 119 Pac. 200.

12. See infra, § 452.

13. Campodonico v. Oregon Improvement Co., 85 Cal. 218, 24 Pac. 746.

14. Peek v. Peek, 75 Cal. 298, 17 Pac. 213. See Du Val v. Boos Bros. Cafeteria Co., 31 Cal. App. Dec. 98, 187 Pac. 767, where the court considered a brief two years overdue in view of the circumstances of the case.

15. Hale & Norcross Silver Min. Co. v. Fox, 120 Cal. 261, 52 Pac. 499 (under rule III as numbered at the time of this decision).

specified confer rights which may be enforced by litigants,[16] it is equally certain that the appellate court may grant a motion made under section 473 of the Code of Civil Procedure for relief from default in filing an opening brief on appeal, where such default is occasioned by mistake, inadvertence or excusable neglect.[17] The appellant may show such excuse in opposition to a motion to dismiss, and the court in the exercise of its discretion may refuse to dismiss the appeal.[18] A large discretion is committed to the court in the matter of determining whether a party

16. See supra, § 417.

17. Borgmeyer v. Solomon, 39 Cal. App. 106, 178 Pac. 544; Paramore v. Colby, 37 Cal. App. 648, 174 Pac. 677 (where the appellant in good faith believed the action to be in equity and properly taken to the supreme court, and where he procured an order of the supreme court extending the time for filing brief, his motion to be relieved of his default will be granted, although the supreme court, after granting the extension, made an ex parte order transferring the cause to the district court of appeal on the ground that the appeal was taken to the wrong court, and although the supreme court as a consequence had no jurisdiction to make an order extending time). See infra, § 432, as to power to extend time in such case.

18. Barbour v. Flick, 121 Cal. 425, 53 Pac. 927 (where cross-appeals are taken, under a stipulation that they are to be heard on the same transcript, which was prepared by the defendant, the plaintiff's appeal will not be dismissed where his default in filing his opening brief is due to a mistaken belief that under the stipulation he was to print his opening brief under the same cover as his reply brief to the defendant's opening brief); Niosi v. Empire Steam Laundry (Cal.), 46 Pac. 153 (where delay was caused in part by a misunderstanding between counsel and in part by the poverty of the appellant); In re Lakemeyer's Estate, 6 Cal. Unrep. 695, 65 Pac. 475; Santa Paula Waterworks v. Peralta, 5 Cal. Unrep. 779, 42 Pac. 239 (where there was a misunderstanding between attorneys as to who should act for the appellant); Yolo Water & Power Co. v. Edmands, 31 Cal. App. Dec. 126, 187 Pac. 755 (where appellant's attorney was candidate for an office); Borgmeyer v. Solomon, 39 Cal. App. 106, 178 Pac. 544; Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co., 13 Cal. App. 115, 109 Pac. 36 (explained in Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841).

While the pendency of a motion to dismiss an appeal may be deemed a sufficient ground for extending the time for filing a brief, the pendency of such a motion cannot of itself excuse laches in filing a brief and prevent a dismissal on this ground. Headstrom v. Hellieson, 136 Cal. 498, 69 Pac. 148, citing White v. White, 112 Cal. 577, 44 Pac. 1026.

should be relieved from default. And it has been said that the courts in the determination of such motions should, as far as possible, lean toward a hearing of the case upon its merits.[19]

§ 432. **Extension of Time.**—Subdivision 5 of rule II of the supreme court provides for an extension of time in which to file briefs. This rule reads as follows:

"The time above limited for filing points and authorities shall not be extended except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor. No briefs shall be filed after oral argument except by special order."

A party desiring to invoke this rule must bring himself within the terms upon which the favor is granted.[20] But as the appellant has the right to file his points and authorities until the respondent gives notice of a motion to dismiss, it has been held that an order extending time may be granted after the expiration of the time limited by the rule for the filing of the appellant's brief. Such an order has the effect of extending a right then existing, and cannot be said to revive one which has expired.[1]

"The chief justice is authorized in the name of the supreme court upon stipulation or satisfactory showing by affidavit to make orders extending time for filing . . . briefs. . . . The presiding justices of the district courts of appeal shall have similar authority as to causes pending in their respective courts or divisions."[2]

For the purpose of enabling the court to determine whether an order extending time should be granted, the applicant should show by the affidavit upon which he asks for the order, the date when the transcript was filed, and

19. Pacific Power Co. v. State, 31 Cal. App. 719, 162 Pac. 641.

20. Coats v. Coats, 146 Cal. 443, 80 Pac. 694; Suman v. Archibald, 116 Cal. 41, 47 Pac. 865; Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; McCowen v. Trumann, 22 Cal. App. 361, 134 Pac. 341.

1. Wood v. Mesmer, 39 Cal. App. 108, 178 Pac. 314.

2. Supreme court rule II, subd. 8.

whether any time in addition to that limited by the rule of court has been given either by order or by stipulation, so that it can be determined therefrom whether it is within the discretion of the court to grant the time asked for.[3] The court may revoke an inadvertent order made after the giving of notice to dismiss the appeal.[4]

By stipulation or death of party.—An oral statement of the respondent's attorney that he will not take advantage of appellant's failure to file a brief in time cannot operate to extend the time therefor beyond a reasonable time if it is effectual for such purpose at all.[5] And under section 286 of the Code of Civil Procedure, the time in which to file a brief is not ipso facto extended by the death of the attorney of the adverse party.[6]

L. DISMISSAL, WITHDRAWAL OR ABANDONMENT.

I. GROUNDS FOR DISMISSAL.

§ 433. In General.—A motion to dismiss an appeal is a common remedy by which to challenge the jurisdiction of the appellate court, or to take advantage of some alleged failure of the appellant to comply with the statutes or the rules of court in taking and perfecting his appeal,[7] such as serving notice, giving the undertaking,[8] filing the transcript,[9] and so forth. The appellate courts are not in-

3. Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878.

4. Pierce v. Employers' Indemnity Exchange, 33 Cal. App. 98, 164 Pac. 403.

5. Long v. American Surety Co., 11 Cal. App. 94, 103 Pac. 1094.

6. Larkin v. Superior Court, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 Pac. 841 (overruling Troy Laundry Machinery Co. v. Drivers' etc. Co., 13 Cal. App. 115, 109 Pac. 36. The court in the Troy Laundry case might well have refused to dismiss the appeal there involved in the exercise of a wise discretion and thus reached the same result it did reach. But to hold that the death of the attorney extends the time is unwarranted).

7. Estate of Sharp, 10 Cal. App. 1, 100 Pac. 1071; Dore v. Dougherty, 2 Cal. Unrep. 402, 4 Pac. 1067.

8. See infra, § 440.

9. See infra, § 441.

clined to dismiss appeals upon grounds or for defects in procedure that are purely technical, when it is apparent that the appellant has complied with the substantial requirements for perfecting his appeal, and is prosecuting the same with diligence and in good faith.[10] And a motion is not a proper remedy by which to have the merits of an appeal determined in advance of the hearing. If this is its effect, the motion will not be entertained.[11]

Want of prosecution and abandonment.—An appeal will be dismissed for want of prosecution,[12] unless both parties are equally guilty of laches.[13] So, also, an appeal will be dismissed where the circumstances warrant the conclusion that it has been abandoned,[14] as where the appellant has failed to pursue the legal steps necessary to the preparation and filing of the record.[15]

Death of party.—An appeal taken in the name of a deceased party will be dismissed.[16] So, also, except where the statute provides otherwise,[17] an appeal will be dismissed where notice of appeal is given by[18] or served upon[19] an attorney of an adverse party after the death of his client. It is not a ground for denying the motion, that the personal representative of the decedent has not been sub-

10. Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Hill v. Finnigan, 54 Cal. 311.

11. See infra, § 451.

12. Williams v. Hall, 24 Cal. 156 (where the appellant fails to file a brief in time and the transcript contains no specification except the general one that the judgment is not warranted by the evidence, the appeal will be dismissed for want of prosecution); Burr v. Navarro Mill Co., 4 Cal. Unrep. 471, 35 Pac. 990. See supra, § 430, as to effect of failure to file transcript or brief in time.

13. Tripp v. Duane, 86 Cal. 149, 24 Pac. 867.

14. Hatch v. Galvin, 50 Cal. 441. See supra, § 34, as to appealability of order denying motion for new trial.

§ 15. See supra, § 229 et seq.

16. Sheldon v. Dalton, 57 Cal. 19 (where one of the respondents was dead); Sanchez v. Roach, 5 Cal. 248 (where appellant was dead).

17. See supra, § 128.

18. Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921.

19. Estate of Turner, 139 Cal. 85, 72 Pac. 718; Shartzer v. Love, 40 Cal. 93.

stituted in the appellate court, as the court has no jurisdiction of the appeal.[20]

Want of authority in attorney.—An appeal may be dismissed because taken by an attorney without authority to appeal. Since it will be presumed that an attorney signing a notice of appeal had authority to do so, an appeal will not be dismissed on motion of the respondent on the ground that it is prosecuted against the will of the appellant, unless the appellant himself objects; nor will the court in such case, pass upon the weight of conflicting affidavits to ascertain whether the appellant desires the appeal dismissed.[1] But an appeal cannot be dismissed on the ground that the attorney for appellant is not an attorney of record in the case, but is a member of a firm of attorneys who appeared as attorneys of record in the trial court.[2]

Defects in brief.—An appeal by the alternative method will not be dismissed because of a failure of the appellant to print in his brief such portions of the record as he desires to call to the attention of the court as required by the code.[3]

Other grounds.—Where two appeals are taken from the same judgment or order, the second will be dismissed if no question as to the validity of the first is raised,[4] or where a dismissal of a prior appeal from the same order operated as an affirmance.[5] So, also, an appeal from a

20. Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371. See ACTIONS, vol. 1, p. 64.

1. Woodbury v. Nevada Southern Ry. Co., 120 Cal. 367, 52 Pac. 650; Id., 115 Cal. 85, 46 Pac. 862. See Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805, holding that whether or not the attorney was duly authorized to take an appeal is exclusively a question to be determined by the court to which the appeal is taken, and that so long as no attack is made on the appeal in the appellate court by motion to dismiss or otherwise, the trial court must regard it as a valid appeal. See ATTORNEYS AT LAW.

2. Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105.

3. See supra, § 363 (record).

4. Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; Swortfiguer v. White, 6 Cal. Unrep. 778, 66 Pac. 80.

5. Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170; Spinetti v. Grignardello, 54 Cal. 521.

decree in a proceeding in the nature of a bill of review which presents the same questions as must be presented on a pending appeal from the judgment will be dismissed.[6]

§ 434. Want of Jurisdiction.—Since, as has been seen, appellate jurisdiction of the supreme court and district court of appeal over judgments of the superior court include those in which that court has improperly assumed jurisdiction,[7] an appeal will not be dismissed upon the ground that the superior court had no jurisdiction to entertain the proceedings, when it has assumed such jurisdiction and rendered an affirmative judgment therein.[8] If a cause is not within the jurisdiction of an appellate court, an appeal will be dismissed on motion of the respondent,[9] or, in the absence thereof, by the court upon its own motion.[10] An appeal, therefore, will be dismissed where the amount in controversy is less than the jurisdictional limits of an appellate court,[11] or where the

6. Kirk v. Reynolds, 12 Cal. 99.

7. See supra, § 14.

8. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

9. City of Madera v. Black, 181 Cal. 306, 184 Pac. 397; Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 63 Pac. 346; Bixler's Appeal, 59 Cal. 550; Appeal of Haughton, 42 Cal. 35; Tracy v. Sumida, 31 Cal. App. 716, 161 Pac. 503; Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772. See supra, §§ 11–14, inclusive. See infra, § 438.

An appeal will be dismissed where the statute upon which the jurisdiction of the appellate court depends is repealed pending the appeal. Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 Pac. 704. See infra, § 470 et seq., as to consideration upon review of matters subsequent to appeal.

10. Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113; overruled in Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366, on other grounds.

11. Dungan v. Clark, 159 Cal. 30, 112 Pac. 718; Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 63 Pac. 346; Edsall v. Short, 122 Cal. 533, 55 Pac. 327; Dungan v. Clark, 159 Cal. 30, 112 Pac. 718; Henigan v. Ervin, 110 Cal. 37, 42 Pac. 457; Holmes v. Warren (Cal.), 9 Pac. 71; Langan v. Langan, 83 Cal. 618, 23 Pac. 1084 (overruled on other grounds by Harron v. Harron, 123 Cal. 508, 56 Pac. 334; Hoyt v. Stearns, 39 Cal. 92); Bolton v. Landers, 27 Cal. 106 (where the amount in dispute did not exceed two hundred dollars); People v. Carman, 18 Cal. 693; Crandall v.

judgment appealed from was rendered by a superior court upon appeal from a justice's court.[12] If, however, a case is within the jurisdiction of an appellate court, either the supreme court or a district court of appeal, no right of an appellant is affected because he may have taken his appeal to the wrong court, as the constitution specifically provides that an appeal shall not be dismissed for this reason.[13] In such case it is the rule that the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto.[14] And even where, by reason of a mistake in entitling the appeal, it has found its way to the calendar of the court, it will not be dismissed. In this event, the cause may be stricken from the calendar or ordered transferred. The latter method is preferable as avoiding extra trouble and expense in making application to the proper court for an order requiring a transfer to it of the record.[15]

§ 435. Want of Right to Appeal.—Unless a decision of the motion involves the merits of the case,[16] an appeal will be dismissed on motion made before a hearing on the merits, where the appellant has not the requisite interest,

Blen, 15 Cal. 406; Doyle v. Seawall, 12 Cal. 280; Luther v. The Apollo, 1 Cal. 15; Ertle v. Placer County, 5 Cal. Unrep. 302, 44 Pac. 229; Myers v. Liening, 1 Cal. Unrep. 78; Earl v. George, 1 Cal. Unrep. 52; Wagner v. Cardinet Fountain Brush Co., 32 Cal. App. 493, 163 Pac. 337; Bartnett v. Hull, 19 Cal. App. 91, 124 Pac. 885 (the court has no jurisdiction of the appeal other than to order a dismissal thereof); Willow Land Co. v. Goldschmidt, 11 Cal. App. 297, 104 Pac. 841; Cox v. Southern Pacific Co., 2 Cal. App. 248, 83 Pac. 290. See supra, §§ 48–51, inclusive.

12. O'Meara v. Hables, 163 Cal. 240, 124 Pac. 1003. See supra, § 17.

13. Const., art. VI, § 4; People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; Litch v. O'Connor, 8 Cal. App. 489, 97 Pac. 207; Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297.

14. See COURTS.

15. Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297.

16. People ex rel. Fogg v. Perris Irr. Dist., 6 Cal. Unrep. 349, 58 Pac. 907; Darlington v. Butler, 7 Cal. Unrep. 246, 85 Pac. 931. See infra, § 451.

or is not an aggrieved party,[17] or where he has waived his right to appeal, by consenting to the judgment or order appealed from,[18] by accepting the benefits of the judgment appealed from,[19] or by entering into a stipulation, founded upon a sufficient consideration, waiving his right to appeal.[20] The court will not only dismiss an appeal where the appellant had no interest in the subject matter at the time of taking the appeal, but also where the interest of the appellant, though sufficient at the time of the taking of the appeal, has terminated pending the appeal. In principle, it matters not whether the relinquishment of the claim be voluntary, as by purchase, abandonment or compromise, or involuntary, as by judicial decree. In both cases the interest of the appellant in the controversy has come to an end, and the decision on the appeal cannot affect the result as to the thing in issue in the case before the court[1].

It has been contended that the rule requiring a dismissal of appeals from consent orders is subject to two exceptions, the first being in cases where the lower court did not have jurisdiction of the subject matter of the action, and the second in cases where the complaint is fatally defective. Whether the rule is subject to these exceptions is an open question in this state.[2]

17. Williams v. Savings & Loan Soc., 133 Cal. 360, 65 Pac. 822; Estate of Burdick, 112 Cal. 387, 44 Pac. 734; Thorpe v. North Moneta Garden Lands Water Co., 12 Cal. App. 186, 106 Pac. 1107. See supra, § 56.

18. Hibernia Savings & Loan Soc. v. Waymire, 152 Cal. 286, 92 Pac. 645; Guigni v. Ratto, 41 Cal. App. 49, 181 Pac. 809. See supra, §§ 61, 62.

19. Ayers v. Ross, 175 Cal. 191, 165 Pac. 529. See supra, § 64.

20. Oliver v. Blair, 2 Cal. Unrep. 441, 5 Pac. 917; United States Consol. Seeded Raisin Co. v. Chaddock & Co., 173 Fed. 577, 97 C. C. A. 527, 19 Ann. Cas. 1054.

1. Estate of Blythe, 108 Cal. 124, 41 Pac. 33. See ACTIONS, vol. 1, p. 49.

2. Guigni v. Ratto, 41 Cal. App. 49, 181 Pac. 809 (holding that an examination of a certified copy of the judgment-roll fails to show the case at bar to be within either exception).

§ 436. **Frivolous and Sham Appeals.**—While a good reason for a speedy submission and decision of an appeal, it is no ground for dismissal, that an appeal is without merit, or that it is sham and frivolous,[3] or that it was taken for delay.[4] To determine that an appeal is frivolous and groundless involves a consideration of the merits of the appeal.[5] Hence, a motion to dismiss upon this ground is in substance a motion to advance the cause for hearing prior to its being reached in its regular order on the calendar, and to permit such a procedure would be practically to dispense with the regular calendar of causes.[6] Moreover, an appeal is a matter of right and cannot be defeated because the appeal may be groundless. The remedy of the respondent in such cases is by an award of damages by the appellate court under the statute.[7]

§ 437. **Decree Ineffectual or Questions Moot.**—As appellate courts will not decide questions which are moot and which will not affect the rights of the parties, an appeal will be dismissed where all the questions involved in it have become moot and abstract[8] or where, because of

3. Quist v. Michael, 153 Cal. 365, 95 Pac. 658; Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120; Estate of Blythe, 108 Cal. 124, 41 Pac. 33; Randall v. Duff, 105 Cal. 271, 38 Pac. 739; Randall v. Duff, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803; Langan v. Langan, 86 Cal. 132, 24 Pac. 852; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Foscalina v. Doyle, 48 Cal. 151; Ricketson v. Torres, 23 Cal. 636; People ex rel. Fogg v. Perris Irr. Dist., 6 Cal. Unrep. 349, 58 Pac. 907; Parker v. Bernal, 2 Cal. Unrep. 507, 7 Pac. 634; Estate of Riviere, 7 Cal. App. 755, 96 Pac. 16.

4. Gregory v. Keating, 2 Cal. Unrep. 865, 18 Pac. 389.

5. Estate of Blythe, 108 Cal. 124, 41 Pac. 33. See infra, § 451.

6. Randall v. Duff, 105 Cal. 271, 38 Pac. 739.

7. Ricketson v. Torres, 23 Cal. 636.

8. Piper v. Hawley, 179 Cal. 10, 175 Pac. 417 (holding questions are not moot; and besides, the questions involved are of great importance to the state at large); Estate of McSwain, 176 Cal. 287, 168 Pac. 117; Guardianship of Ambrose, 170 Cal. 160, 149 Pac. 43; Wright v. Board of Public Works, 163 Cal. 328, 125 Pac. 353; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031; Mitchell v. Madden (Cal.), 62 Pac. 483; Foster v. Smith, 115 Cal. 611, 47 Pac. 591; In re Tucker, 7 Cal. Unrep. 243, 83 Pac. 814; Read v. San Diego Union Co., 6 Cal. Unrep. 845, 67 Pac. 1; Dehail

the happening of some event, a decision would be ineffectual and could serve no useful purpose.[9] Accordingly, an appeal from an order dissolving an injunction restraining a stockholder from voting at an election of corporate officers presents merely an academic question after the election was had.[10] The same is true of an appeal from an order denying an intervention after a dismissal of the action in which the right to intervene is claimed,[11] and of an appeal from an order refusing to vacate a judgment or order, after a reversal of such judgment or order.[12] So, also, an appeal from an order in a proceeding to appoint a guardian, involves only moot questions and will be dismissed if the minor becomes of age,[13] or if the alleged incompetent dies.[14] The questions presented by an appeal become moot, and the appeal will be

v. City of Los Angeles, 5 Cal. Unrep. 866, 51 Pac. 27 (where pending an appeal from a judgment against the plaintiff in an action relating to taxes, the plaintiff pays the taxes and redeems his property, the appeal presents merely a moot question and will be dismissed); Weavering v. Schneider, 30 Cal. App. Dec. 729, 186 Pac. 602; Bernard v. Weaber, 23 Cal. App. 532, 138 Pac. 941; Broadbent v. Keith, 17 Cal. App. 389, 119 Pac. 939 (where in election contest one contestant resigned and the other was appointed); Munger's Laundry Co. v. Rankin, 8 Cal. App. 448, 97 Pac. 95. See Fox v. Grayson, 6 Cal. Unrep. 72, 53 Pac. 932, denying motion, as it was not clear that reversal of order dissolving a temporary injunction would not have legal effect. See supra, §§ 12, 13.

As to fictitious actions and moot questions generally, see ACTIONS, vol. 1, p. 335.

9. Gove v. Board of Supervisors of San Francisco (Cal.), 54 Pac. 1130; Horton v. City of Los Angeles, 119 Cal. 602, 51 Pac. 956 (dismissing appeal from judgment enjoining defendant from proceeding under a special statute, after the repeal of such statute). But see Cohen v. Gray, 54 Cal. 595, holding that an appeal from an order made in a statutory proceeding will not be dismissed because of the repeal of the statute, where the question of costs is involved.

10. Foster v. Smith, 115 Cal. 611, 47 Pac. 591.

11. Mitchell v. Madden (Cal.), 62 Pac. 483.

12. Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

13. Estate of McSwain, 176 Cal. 287, 168 Pac. 117.

14. In re King, 29 Cal. App. Dec. 825, 184 Pac. 964. Perhaps a letter from counsel informing of the death of a party is sufficient as a suggestion of death.

dismissed when the judgment has been satisfied.[15] And the same course will be followed where the parties have compromised and settled their controversy out of court,[16] unless the respondent's counsel holds an assignment of an interest in the judgment and the compromise is made without his consent and after notice to the appellant of such assignment.[17]

§ 438. As to Judgment or Order Appealed from.—An appeal purporting to be from an order or judgment will be dismissed if the record shows no order or judgment to support it,[18] as where an appeal is taken from a judgment or order after the granting of a motion to vacate it.[19] Where an appeal from a judgment and an order granting a new trial are heard together, the court in affirming the latter order may dismiss the appeal from the judgment, as the judgment falls on entry of the order granting a new trial.[20]

15. Vosburg v. Vosburg, 131 Cal. 628, 63 Pac. 1009; Moore v. Morrison, 130 Cal. 80, 62 Pac. 268; Estate of Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405 (decree of distribution); People v. Burns, 78 Cal. 645, 21 Pac. 540 (the fact that the appeal is taken from the order denying a new trial is immaterial, as a reversal of that order would necessarily carry with it a new trial and reversal of the judgment, which cannot be had after it is satisfied by the party in whose favor it was rendered); Hurt v. Bauer, 37 Cal. App. 109, 173 Pac. 601. See Brode v. Gosslin, 16 Cal. App. 632, 117 Pac. 778, refusing to pass on motion, as judgment must be affirmed upon the record.

16. Nelson v. Nelson, 153 Cal. 204, 94 Pac. 880; Armstrong v. Sacramento Valley R. Co., 179 Cal. 648, 178 Pac. 516 (such agreement merges the judgment, and any subsequent remedy must be based upon the compromise agreement, even though it is only partially performed by the defendant); In re Tucker, 7 Cal. Unrep. 243, 83 Pac. 814; Weavering v. Schneider, 30 Cal. App. Dec. 729, 186 Pac. 602; Pasmore v. Pacific Carbon Mfg. Co., 32 Cal. App. 807, 163 Pac. 221. See supra, § 13.

17. Richman v. San Francisco N. & C. Ry., 180 Cal. 454, 181 Pac. 769.

18. Granger v. Richards, 126 Cal. 635, 59 Pac. 118; First Nat. Bank of San Luis Obispo v. Henderson, 101 Cal. 307, 35 Pac. 899 (where trial court granted new trial pending appeal); People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029 (where a new trial was granted pending appeal). See supra, § 15.

19. Storke v. Storke, 111 Cal. 514, 44 Pac. 173. See supra, § 22.

20. San Jose Safe Deposit Bank of Savings v. Bank of Madera, 121

Nonappealability of judgment or order.—The nonappealability of a judgment or order is a good ground for dismissal of an appeal therefrom.[1] An appeal from a

Cal. 543, 54 Pac. 85; Blackburn v. Abila, 4 Cal. Unrep. 982, 39 Pac. 797; Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205; Brooks v. San Francisco & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570; Bronner v. Wetzlar, 55 Cal. 419; Kower v. Gluck, 33 Cal. 401. See supra, § 22.

1. Tucker v. Beneke, 180 Cal. 588, 182 Pac. 299 (order denying new trial); Marsh v. Lapp, 180 Cal. 231, 180 Pac. 533 (order denying a new trial); Cornic v. Stewart, 179 Cal. 242, 176 Pac. 164 (order sustaining demurrer); Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680 (order on demurrer; Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019 (order denying motion for new trial); Rickert v. Zoeger, 169 Cal. 399, 146 Pac. 894 (order sustaining demurrer); In the Matter of the Estate of Cahill, 142 Cal. 628, 76 Pac. 383 (order refusing to vacate order setting apart homestead); Free Gold Min. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61; Estate of Hughston, 133 Cal. 321, 65 Pac. 742, 1039; Estate of Winslow, 128 Cal. 311, 60 Pac. 931; Clarke v. Witram, 99 Cal. 50, 33 Pac. 798 (dismissing an appeal from an order setting aside service of summons where there is no judgment-roll and the bill of exceptions does not show the order was made after final judgment); In re Smith's Estate, 98 Cal. 636, 33 Pac. 744; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396 (an order refusing to vacate an order denying a new trial); Tripp v. Santa Rosa Street R. R. Co., 69 Cal. 631, 11 Pac. 219 (an order refusing to vacate an appealable order); Estate of Calahan, 60 Cal. 232; Clark v. Dunnam, 46 Cal. 204; Hibberd v. Smith, 39 Cal. 145 (order on demurrer); Ketchum v. Crippen, 31 Cal. 365 (order striking out statement on motion for new trial); Juan v. Ingoldsby, 6 Cal. 439 (order granting a change of venue); Visscher v. Dixon, 31 Cal. App. Dec. 539, 188 Pac. 1029; Norman B. Livermore & Co. v. Guardian Casualty & Guar. Co., 30 Cal. App. Dec. 137, 185 Pac. 413; Anderson v. Adler, 29 Cal. App. Dec. 623, 184 Pac. 42 (order denying a motion for new trial); Hammond v. Hazard, 40 Cal. App. 45, 180 Pac. 46 (order denying a new trial); Frede v. Justice's Court, 30 Cal. App. 85, 157 Pac. 528 (a minute order dismissing a petition for writ of review, after the writ was granted); Hester v. McMullan, 29 Cal. App. 664, 157 Pac. 521 (order denying new trial); Brunson v. City of Santa Monica, 25 Cal. App. 383, 143 Pac. 792 (order sustaining demurrer); Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772 (order on demurrer); Estate of Seymour, 15 Cal. App. 287, 114 Pac. 1023 (a probate order refusing to vacate an order fixing place of interment of body of deceased); Forrester v. Lawler, 14 Cal. App. 170, 111 Pac. 284 (order refusing to dismiss an action); Estate of Overton, 13 Cal. App. 117, 108 Pac. 1021 (order discontinuing family allowance to widow). See supra, §§ 15–47, inclusive.

judgment or order which is not directly appealable confers no jurisdiction upon an appellate court, and will be dismissed on motion of the respondent,[2] or, in the absence thereof, by the court upon its own motion.[3] Where an appeal is not given by statute, it is not sufficient answer to a motion to dismiss that the lower court had no authority to make the order appealed from.[4] If a motion for dismissal on this ground involves a consideration of the case upon its merits, the motion will be denied without prejudice or continued until the hearing of the appeal upon its merits.[5] Thus, where on a motion to dismiss an appeal from an order refusing to vacate an appealable judgment it is necessary to examine the record to determine whether the grounds relied upon for the appeal from the order are available on the appeal from the judgment, the appeal will not be dismissed.[6] When two appeals are taken in a case, one from a judgment and one from an order, one may be dismissed and the other allowed to remain.[7]

§ 439. Defects in Proceedings in Trial Court.—Matters occurring prior to the order appealed from cannot be considered on a motion to dismiss an appeal,[8] for the reason that this would involve an examination of the action of the court below, and a determination of the merits of the appeal prior to the hearing.[9] In other words, if an appeal has been properly taken from an order subject to be reviewed by an appellate court, it cannot be dismissed upon the ground that the court below improperly made

2. Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772.

3. Estate of Wiard, 83 Cal. 619, 24 Pac. 45. See infra, § 445.

4. Estate of Overton, 13 Cal. App. 117, 108 Pac. 1021. See supra, § 14.

5. Hale & Norcross Silver Mining Co. v. Fox, 122 Cal. 56, 54 Pac. 270. See infra, § 451.

6. Hibernia Sav. & Loan Soc. v. Cochran, 6 Cal. Unrep. 821, 66 Pac. 732. See supra, §§ 30–32, as to appealability of such judgments.

7. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176.

8. Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

9. Estate of Scott, 124 Cal. 671, 57 Pac. 654. See infra, § 451.

the order.[10] By this rule an appeal from an order denying a new trial, assuming such order to be appealable,[11] will not be dismissed because of irregularities in the proceedings prior to the order on new trial,[12] such as a failure to serve and file a notice of intention to move for a new trial in proper time,[13] or the premature service of such notice,[14] or the failure to serve such notice on all the adverse parties,[15] or to serve it at all.[16] Neither will such an appeal be dismissed because of the insufficiency of the notice of motion,[17] or a failure to serve a bill of exceptions in time,[18] or upon an adverse party.[19] Such matters do not deprive the appellate court of jurisdiction. They may constitute good reason for denying the motion and for affirmance of the order of denial, but they are not grounds for dismissal.[20]

§ 440. Defects in Proceedings for Review.—Formerly, there was some diversity of opinion in case the proceed-

10. Wolf v. Board of Supervisors, 143 Cal. 333, 76 Pac. 1108; Estate of Scott, 124 Cal. 671, 57 Pac. 654.

11. Since 1915, orders denying new trials have not been directly appealable. See supra, § 34.

12. Lincoln v. Sibeck, 25 Cal. App. 331, 143 Pac. 789.

13. Barclay v. Blackinton, 127 Cal. 189, 59 Pac. 834; Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898; Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Schieffery v. Tapia, 68 Cal. 184, 8 Pac. 878; Harlan v. Pratt, 50 Cal. 94.

14. Bell v. Staacke, 137 Cal. 307, 70 Pac. 171.

15. Marshall & Stearns Co. v. Deneen Bldg. Co., 169 Cal. 229, 146 Pac. 684; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182; Id., 146 Cal. 571, 80 Pac. 719; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Gardner v. Stare, 6 Cal. Unrep. 777, 66 Pac. 3.

16. Bell v. Staacke, 137 Cal. 307, 70 Pac. 171; Sutter County v. Tisdale, 128 Cal. 180, 60 Pac. 757; Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; Turner v. F. W. Ten Winkel Co., 24 Cal. App. 213, 140 Pac. 1086.

17. Estate of Scott, 124 Cal. 671, 57 Pac. 654.

18. Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

19. Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621; Dore v. Dougherty, 2 Cal. Unrep. 402, 4 Pac. 1067.

20. Estate of Ryer, 110 Cal. 556, 42 Pac. 1082.

ings taken to perfect an appeal were ineffectual to confer jurisdiction upon the appellate court, as to whether the appeal should be dismissed or simply ignored as having no legal existence. This was particularly true in case of a failure to file an undertaking in time, as the statute expressly declared that in that event the appeal was ineffectual for any purpose.[1] Inasmuch, however, as the face of the records of the case in the superior court show that an appeal has been taken, notwithstanding the proceedings are ineffectual to transfer jurisdiction, the present practice is to grant a dismissal for the purpose of removing such apparent appeal from the records.[2]

Rule applied.—An appeal will be dismissed for the following defects in the proceedings: Where an appellant, proceeding by the alternative method, fails to give the notice contemplated by section 941b of the Code of Civil Procedure,[3] or where an appellant, proceeding by the

1. Bellegarde v. San Francisco Bridge Co., 80 Cal. 61, 22 Pac. 57; Biagi v. Howes, 63 Cal. 384 (as the dismissal should be without prejudice, the form of the order, whether of dismissal or of a refusal to hear the appellant, is not very material, though the latter is the better practice); Reed v. Kimball, 52 Cal. 325; Dinan v. Stewart, 48 Cal. 567, refusing to dismiss where there was a failure to serve notice of appeal on all adverse parties; In re Walkerly's Estate, 4 Cal. Unrep. 819, 37 Pac. 893 (where appeal was taken too late). See Code Civ. Proc., § 940.

2. Little v. Thatcher, 151 Cal. 558, 91 Pac. 321 (where an undertaking on appeal from an order recited the judgment only); Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Boyd v. Burrel, 60 Cal. 280; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Reay v. Butler (Cal.), 25 Pac. 350; Continental Building & Loan Assn. v. Beaver, 6 Cal. App. 116, 91 Pac. 666 (dismissal by the court on its own motion).

3. Boling v. Alton, 162 Cal. 297, 122 Pac. 461; Lent v. California Fruit Growers' Assn., 161 Cal. 719, 121 Pac. 1002; Salisbury v. Yawger, 30 Cal. App. Dec. 376, where the court dismissed the appeal on its own motion. Compare Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430, where the only notice in the record in this case was a notice to the reporter to prepare a transcript on appeal, which, as has been stated, is not a good notice of appeal, but the court held that as counsel for the respondent did not raise any objection, it would be as-

regular method, fails to serve a notice of appeal upon all adverse parties;[4] where notice was served by mail in a case in which such service was not authorized by law;[5] where the appeal was not taken within the time limited by statute;[6] where the proof of service was insufficient, and it is not otherwise shown that proper service was made;[7] where no undertaking on appeal is filed;[8] or where the undertaking filed is not in conformity with the requirements of the code and a sufficient undertaking is not filed before the hearing of the motion to dismiss;[9] or where the undertaking is filed too late;[10] or when it is

sumed that a proper notice was filed but that its insertion in the record was waived. See supra, § 112.

4. Bair v. Watkins, 130 Cal. 540, 62 Pac. 929; Estate of Scott, 124 Cal. 671, 57 Pac. 654; Koyer v. Benedict, 4 Cal. App. 48, 87 Pac. 231. See Dinan v. Stewart, 48 Cal. 567, refusing to dismiss because there was no appeal. See Estate of Russell, 150 Cal. 604, 89 Pac. 345, not deciding point because determination on merits rendered it unnecessary. See supra, § 116.

But where the determination of the motion involves an examination of the merits of the appeal, the appeal will not be dismissed on motion made before the hearing of the merits. See infra, § 451.

The respondent is not precluded from moving to dismiss on this ground by reason of the fact that the cause had been previously submitted for decision; Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758.

5. Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398; Koyer v. Benedict, 4 Cal. App. 48, 87 Pac. 231. See Brandenstein v. Johnson, 134 Cal. 102, 66 Pac. 86, holding positive statements in the affidavit of proof of service overcome contrary inferences from facts stated in the affidavit for respondent. See supra, § 132.

6. See supra, § 165.

7. Pacific Mutual Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398 (where the affiant stated that he "believed" he had made service). See Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8, as to right to make other proof than that in transcript. See supra, § 133.

8. Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998 (appeal will be dismissed without prejudice to another appeal if no undertaking is filed); Biagi v. Howes, 63 Cal. 384; Winder v. Hendrick, 54 Cal. 275 (where clerk's certificate omitted to state that an undertaking in due form was filed); Willow Land Co. v. Goldschmidt, 11 Cal. App. 297, 104 Pac. 841; Heinrich v. Heinrich, 2 Cal. App. 479, 84 Pac. 326. See supra, § 136.

9. Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147; Winder v. Hendrick, 54 Cal. 275. See supra, §§ 141, 161.

10. Gordon v. Wansey, 19 Cal. 82; Rauer's Law & Collection Co. v.

filed before the notice of appeal was served.[11] The fact that the sureties fail to justify upon an appeal bond is not ground for dismissal of an appeal.[12] Nor is it a ground for dismissal that an attorney of the appellant became a surety upon the undertaking on appeal in violation of a rule of the superior court. This is a matter cognizable before the superior court, to be dealt with as it shall be advised.[13]

§ 441. Failure to File Transcript or Brief in Time.— Rule V of the supreme court provides that if the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion on notice given.[14] In the case of a failure to file a transcript, the respondent is only required to show in the first instance that more than forty days have expired since the perfecting of the appeal, and in the absence of any further showing on the part of the appellant, the appeal will be dismissed. The burden is then upon the appellant to show that he is within some exception; for example, that a bill of exceptions has been settled and that forty days have not elapsed since its settlement, or that proceedings for its settlement are still pending.[15]

Standley, 3 Cal. App. 44, 84 Pac. 214. See supra, § 154.

11. But where there is a conflict in the affidavits as to whether the undertaking was so filed, the motion to dismiss will be denied; Coonan v. Loewenthal, 122 Cal. 72, 54 Pac. 388.

12. Klingler v. Henderson, 137 Cal. 561, 70 Pac. 617; De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Hill v. Finnigan, 54 Cal. 311. See supra, § 160.

13. De Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. Rep. 90, 60 Pac. 45.

14. See supra, § 430.

15. White v. White, 112 Cal. 577, 44 Pac. 1026.

While the pendency of proceedings for the settlement of a bill of exceptions prevents the running of the time for filing the transcript, such proceedings must be actually pending, undisposed of and not abandoned. If such proceedings are abandoned, the appeal may be dismissed. See infra, § 442.

If the transcript or points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact will be sufficient to answer to the motion. In such case the mere filing of the transcript or points and authorities is sufficient of itself to defeat the motion.[16] But if they are not filed until after notice given, something more is required to avoid a dismissal.[17] In such case, the appellant may at the time the motion to dismiss is made[18] show by affidavit, facts by way of excuse for his default, and if the appellate court deems the facts sufficient to call for a relaxation of the rule, it will not dismiss the appeal.[19] The nature of the circumstances which have been held sufficient to justify a relaxing of the rule is indicated by the parenthetical statements following the citations in the note below.[20] It has been held,

16. See infra, § 452; supra, § 375.

17. Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Heinlen v. Southern Pacific R. Co., 65 Cal. 304, 4 Pac. 15.

18. These circumstances excusing the failure to file the transcript will not be heard after the motion to dismiss has been granted, on a motion to set aside the order dismissing the appeal. Welch v. Kenney, 47 Cal. 414.

19. Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Welch v. Kenney, 47 Cal. 414. See Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329 ("assuming" that such excuse may be shown). See supra, § 379.

20. Gjurich v. Fieg, 160 Cal. 331, 116 Pac. 745 (declining to dismiss the appeal where the reporter refused to file the transcript because of nonpayment of his fees, as the point was new and the case was one of first impression, this notwithstanding that in ordinary cases the failure within a reasonable time to resort to mandamus proceedings would have warranted a dismissal); Robinson v. Robinson, 158 Cal. 117, 110 Pac. 112 (poverty of appellant in divorce action held sufficient excuse); Estate of Keating, 158 Cal. 109, 110 Pac. 109 (mistake of attorney as to procedure not an excuse where palpable and groundless); Estate of Heywood, 154 Cal. 312, 97 Pac. 825 (holding delay inexcusable under the facts); Castro v. Breidenbach, 143 Cal. 335, 76 Pac. 1114 (where a proposed statement on new trial and proposed amendments thereto had been presented to the judge, and the judge had not settled the same, no laches of the appellant appearing, the appeal will not be dismissed); Desmond v. Faus, 83 Cal. 134, 23 Pac. 303 (where appellant obtained extension of time but inadvertently neglected to file it); Carter v. Paige, 77 Cal. 64, 19 Pac. 2 (the default is sufficiently excused by a showing that the transcript was ready to be certified

however, that an appeal will not be dismissed where the affidavit shows that the appeal was taken and prosecuted in good faith, that the delay would not appreciably delay the hearing on the merits, and where the circumstances are such that they would have warranted an order extending the time for filing the transcript or points and authorities if brought to the attention of the court before the motion to dismiss was made.[1] By analogy, however, to proceedings under section 473 of the Code of Civil Procedure, if this section is not directly applicable, an appellant asking relief from his default should at least show that he has consulted counsel and has been advised by them that in their opinion he has reasonable grounds to expect a reversal of the order appealed from if the appeal were considered on the merits.[2] An order extending

and filed in time, and the delay was caused through a mistaken statement to appellant's counsel that copies had been left as requested with respondent's counsel for his certificate of correctness); Grant v. De Lamori, 71 Cal. 329, 12 Pac. 228 (where appellant obtained an order extending time but neglected to file it); Pickett v. Wallace, 54 Cal. 147 (an appeal will not be dismissed where the justices of the appellate court are disqualified to decide a cause, and a transcript is filed before there is a court competent to hear it, though after the time fixed by rule and after the giving of notice to dismiss); Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402, 35 Pac. 310 (where time was extended by stipulation); Friend & Terry Lumber Co. v. Devine, 30 Cal. App. Dec. 463, 186 Pac. 187 (where the transcript was not filed in time because of an erroneous understanding of the attorney for the appellant that he desired to abandon the appeal); Erving v. Napa Valley Brewing Co., 16 Cal. App. 41, 116 Pac. 331 (a reliance upon the clerk to file the transcript is not a sufficient excuse); Gervais v. Joyce, 15 Cal. App. 189, 114 Pac. 409 (where the transcript was left with attorney for examination, and returned within ample time, but through inadvertence the time for filing was overlooked, the appeal will be dismissed); Long v. American Surety Co., 11 Cal. App. 94, 103 Pac. 1094 (whether an affidavit that the respondent orally assured the appellant he would not move to dismiss for a failure to file a brief in time may be considered in opposition to the motion, quaere).

1. Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868.

2. Estate of Keating, 158 Cal. 109, 110 Pac. 109; Erving v. Napa Valley Brewing Co., 16 Cal. App. 41, 116 Pac. 331.

the time in which to file a transcript cannot be attacked on motion to dismiss,[3] and an appeal will not be dismissed on the ground that an appellant did not give the true reason for the delay, where it appears that good reason for the extension exists.[4]

§ 442. Defects or Omissions in Proceedings to Prepare Record.—An appellate court will not ordinarily undertake to determine on a motion to dismiss an appeal whether a party has failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions,[5] or is guilty of laches in having a bill of exceptions settled.[6] This is a matter primarily for the trial court before whom the proceedings are pending. But when it is clear that the bill can never be settled, and that the appellant has abandoned the proceedings therefor, a motion in the appellate court to dismiss the appeal is proper,[7] as such neglect for a period of time to have the bill settled is equivalent to a failure to file the transcript within the time limited.[8] It is better practice, however, for the respondent to avail himself of the objection in the trial court.[9]

3. Gabel v. Page, 4 Cal. App. 509, 88 Pac. 591.

4. Hubback v. Ross, 79 Cal. 564, 21 Pac. 965.

5. Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480; Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543; Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112.

6. Reay v. Butler (Cal.), 25 Pac. 350; Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868. See Crooks v. Crooks, 6 Cal. Unrep. 878, 68 Pac. 101, refusing to dismiss appeal, as the failure to have the bill of exceptions settled was not caused by laches or other fault of appellant.

7. Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480; Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112 (distinguished in Baker v. Eilers Music Co., 24 Cal. App. 348, 141 Pac. 395); Warren v. McGowan, 7 Cal. Unrep. 190, 77 Pac. 909 (where the clerk has not been requested to certify to the transcript for eight months); Harbaugh v. Lassen Irr. Co., 24 Cal. App. 773, 142 Pac. 847; Estate of Johnston, 14 Cal. App. 376, 112 Pac. 191 (where no step after the filing of a proposed bill of exceptions was taken for two years).

8. Estate of Depeaux, 118 Cal. 522, 50 Pac. 682.

9. Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480.

§ 443. Failure to Furnish Requisite Papers.—Section 954 of the Code of Civil Procedure authorizes a dismissal of an appeal where the appellant fails to furnish the requisite papers.[10] While an appeal will not be dismissed when the missing portions of the judgment-roll are not requisite to a full determination of the cause,[11] an appeal may be dismissed under section 954 unless the appellant furnish at the hearing copies of essential papers.[12] So, also, it has been held that an appeal from an order of the superior court will be dismissed if the papers and evidence used or taken on the hearing of the motion are not authenticated by incorporating them in a bill of exceptions or other method provided by law as required by rule XXIX of the supreme court.[13] Inasmuch, however, as

10. Albertsen v. Albertsen, 33 Cal. App. Dec. 93, 192 Pac. 1040. There was a similar provision in the Practice Act, § 346.

11. Paige v. Roeding, 89 Cal. 69, 26 Pac. 787.

12. In re Wierbitszky & Co., 88 Cal. 333, 26 Pac. 174 (where transcript is not certified and no steps are taken to procure a proper certificate upon leave granted, the appeal will be dismissed); Kimple v. Conway, 69 Cal. 71, 10 Pac. 189 (where the judgment-roll did not contain a copy of the final judgment); Buckman v. Whitney, 28 Cal. 555 (where pleadings were omitted); Dyer Law & Collection Co. v. Salisbury, 17 Cal. App. 393, 119 Pac. 947 (where no attempt was made by appellant to comply with Code Civ. Proc., § 953a, in preparing record); Snipsic Co. v. Riverside Music Co., 6 Cal. App. 115, 91 Pac. 747 (dismissing an appeal from a judgment where the transcript was not certified). See infra, § 453, as to obviating defect.

13. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 Pac. 1062; Tingley v. Otis, 141 Cal. 71, 74 Pac. 448 (dismissing an appeal from an order changing the place of trial where a bill of exceptions settled without notice was stricken from the files of the superior court and the transcript); Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491 ("If the transcript contains no record upon which the appeal can be heard, the correctness of the order appealed from is not reviewable, and the appeal will be dismissed"); Linott v. Rowland, 119 Cal. 452, 51 Pac. 687; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Angell v. Delmas, 60 Cal. 254; Cosgrove v. Johnson, 30 Cal. 509 (dismissing appeal from order denying new trial because statement on motion was not agreed to by counsel or settled and authenticated by the court); Bodley v. Ferguson, 25 Cal. 584; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564; Fisher v. Western Fuse & Explosives Co., 12 Cal. App. 299, 107 Pac. 332; Id., 12 Cal. App. 307, 107 Pac. 335; Id., 12 Cal. App. 308, 107 Pac. 335. See

the appellate court has jurisdiction of an appeal notwithstanding infirmities in the transcript, the proper procedure, when the record is wholly insufficient as a basis on which to review the judgment or order appealed from, is not to dismiss the appeal but to affirm the judgment or order.[14] And so, where an appellant has not perfected his appeal by any method, the procedure is to move for an affirmance of the judgment for lack of a record.[15] As stated in substance in a comparatively recent case, the lack of a bill of exceptions on an appeal from an order of a superior court is rather a ground for an affirmance than a dismissal, where, as is usually the case, there is, in the absence of such bill, nothing in the record upon which the action of the court can be properly reviewed, though the court has sometimes granted such a motion, when it was very apparent that the record was insufficient.[16]

II. PROCEEDINGS AND EFFECTS THEREOF.

§ 444. In General.—A dismissal of an appeal may be involuntary upon the motion of the respondent or of the appellate court, or it may be voluntary upon the application of the appellant,[17] or upon the stipulation of the parties.[18]

Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997, allowing appellant to withdraw and for proper authentication.

14. Borges v. Dunham, 169 Cal. 83, 145 Pac. 1011; Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396 (this case is cited in Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491, as authority for the dismissal of the appeal); Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299; Knox v. Schrag, 18 Cal. App. 220, 122 Pac. 969.

15. Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526; Dennis v. Bint, 122 Cal. 39, 68 Am. St. Rep. 17, 54 Pac. 378; Clemens v. Gregg, 34 Cal. App. 272, 167 Pac. 299.

16. Howell v. Howell, 101 Cal. 115, 35 Pac. 443 (holding that when the principal order is in form and effect a judgment, and the appellant contends it should be reversed upon the judgment-roll, a motion to dismiss for want of a bill of exceptions will be denied, especially when the questions presented involve the merits of the whole appeal).

17. See infra, § 445.

18. See infra, this section.

Dismissal of appeal on stipulation.—Rule XXIV of the supreme court, relating to the dismissal of appeals by stipulation, provides as follows:

"An appeal may be dismissed by the court at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties. Where there is no transcript on file, such stipulation shall be accompanied by a certificate of the clerk of the court below, showing the names of the attorneys of the respective parties, the character of the action, including the relief asked by the complaint, and the date and character of the judgment appealed from, and the fact and date of the filing of the notice of appeal."[19]

The parties to an appeal cannot by consent dismiss an appeal and at the same time let it stand as to matters merely incidental to the appeal.[20]

§ 445. Who may Make Motion—*Respondent.*—An appeal may be dismissed in a proper case upon motion of a respondent, who has not waived the objection complained of or is not for some reason estopped from pressing his motion.[1] An objection that notice of appeal was not served upon all the adverse parties may be made by a respondent who was served, although he can suffer no injury from the appellant's failure to serve other parties;[2] or it may be made by an adverse party who was not served and who is not a party to the record. The objection goes to the jurisdiction of the court to entertain the appeal, and it would seem to be immaterial in what manner comes the suggestion that the steps necessary to confer jurisdiction have not been taken. Moreover, to

19. See Camenzind v. Kampfen, 130 Cal. 596, 62 Pac. 1073, decided before this rule was adopted and holding a certificate analogous to that required by subdivision 2 of rule VI to be necessary.

20. Bernal v. Bernal, 1 Cal. Unrep. 581.

1. See infra, § 446.

2. Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641. The right to make the objection "by any respondent before the court" has been often recognized. See supra, § 119 et seq.

hold that only the party receiving notice of appeal may make the motion would place with an appellant, in any case where there are several parties adverse to him, the power to select his opponents on appeal.[3] Where the defect complained of is jurisdictional, it is no ground for denying a motion to dismiss that it is not made on behalf of someone interested in upholding the judgment, for the court in such case will dismiss the appeal upon its own motion whenever its attention is drawn to the defect.[4]

Appellant.—An appeal may be dismissed upon the request or motion of the appellant.[5] In the absence of any objection by the attorney general, an appeal by a county from a judgment rendered against it will be dismissed on a motion made by the district attorney of the county, in pursuance of a resolution of its board of supervisors, although an attorney claiming to act as special counsel for

3. Bullock v. Taylor, 112 Cal. 147, 44 Pac. 457 (citing In re Castle Dome Min. Co., 79 Cal. 246, 21 Pac. 746). But see Blanc v. Rodgers, 47 Cal. 606. This was an action to foreclose a mortgage upon the separate property of a married woman in which the court decreed the surplus, after discharging the mortgage, be paid to her as her separate property. The husband, claiming the land was not all separate property, moved for a new trial and appealed from the order thereon and the judgment without serving the wife with notice of motion for new trial or notice of appeal. It was held that the wife was a stranger to the record and that a motion to dismiss the appeal made on her behalf would not be entertained.

4. Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371 (holding on a motion to dismiss upon the ground that the notice of appeal was served upon the attorney after the death of the respondent, that it is not a ground for denying the motion that there has been no substitution of the personal representative of the decedent and that the motion does not purport to be made on behalf of anyone interested in the judgment).

5. An appeal will be dismissed where the appellant files a written instrument withdrawing his appeal and asking the court to dismiss it with costs. Estate of Wells, 148 Cal. 659, 84 Pac. 37.

Upon a motion of the appellant to dismiss his appeal upon the ground that the judgment has been satisfied, the question cannot be determined whether the judgment was satisfied in fraud of the rights of assignees of the respondent. The dismissal will simply affirm the judgment and leave the rights of the parties to the determination of the superior court. Nunan v. Valentine, 83 Cal. 588, 23 Pac. 713.

the appellant opposes the motion.[6] While the orderly and courteous method of an appellant desiring to dismiss his appeal is to give notice to his attorney, or, in the event of his refusal, after notice, to procure a substitution of attorneys and through the new attorney bring the matter to the attention of the court, he is not deprived of his right to a dismissal because the motion is made by the respondent upon his affidavit, if the attorney taking the appeal has no special contract or charge upon the property in controversy.[7]

Court.—An appellate court will dismiss an appeal upon its own motion where for any reason it has no jurisdiction to entertain it.[8]

§ 446. Estoppel and Waiver.—Unless the objection be jurisdictional, a respondent may be precluded from moving for a dismissal of an appeal because of a waiver of the defect complained of, or because of an estoppel to raise the objection.[9] Where, before the expiration of the time in which to appeal, the respondent enters into a stipu-

6. Allen v. County of San Bernardino, 72 Cal. 450, 14 Pac. 18.

7. Estate of Degnan, 132 Cal. 260, 64 Pac. 485.

8. Estate of More, 143 Cal. 493, 77 Pac. 407 (appeal taken before entry of order appealed from); Estate of Pearsons, 119 Cal. 27, 50 Pac. 929 (premature appeal); Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Salisbury v. Yawger, 30 Cal. App. Dec. 376; Continental Bldg. & Loan Assn. v. Beaver, 6 Cal. App. 116, 91 Pac. 666.

9. Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921 (holding respondents are not estopped to move to dismiss appeal taken in name of a decedent by unauthorized attorneys, merely because they participated in proceedings for new trial and accepted service of notices of appeal, there being no concealment of the death. In this respect this case is distinguishable from Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241. See supra, § 65); Estate of More, 143 Cal. 493, 77 Pac. 407 (holding that by acknowledging service of a notice of appeal the respondent is not estopped from insisting that the appeal was taken prematurely before entry of the order, because it is stated in the notice that the order was entered); Gardner v. California Guarantee Inv. Co., 129 Cal. 528, 62 Pac. 110 (estoppel to object to insufficiency of undertaking).

lation that a proper undertaking on appeal has been filed, he will not, after the time for appealing has elapsed, be allowed to contradict his former admission and ask for a dismissal on the ground that the undertaking filed was insufficient.[10] Such stipulation, however, is limited in its effect to the undertaking, and cannot estop a respondent from moving to dismiss upon other grounds; for instance, upon the ground that the appeal was not taken in time.[11] Repeated refusals to acknowledge satisfaction of a judgment estop a respondent from moving to dismiss on the ground that the judgment has been satisfied, as he cannot for one purpose refuse to acknowledge satisfaction of the judgment, and for another insist that it is satisfied.[12] But an objection that a respondent is estopped by his acts from pressing a motion to dismiss cannot avail an appellant, when the defect goes to the jurisdiction of the appellate court to entertain the appeal. In such case, upon the fact appearing, the appeal will be dismissed by the court upon its own motion.[13] And grounds for dismissal which go to the jurisdiction of the appellate court are not waived by a failure to state them in the notice of motion. They may be raised for the first time in the brief of the respondent.[14]

§ 447. When and Where Motion Made.—Good practice requires that grounds of dismissal be presented before a submission of the cause on the merits.[15] A motion to dis-

10. Springer v. Springer, 126 Cal. 452, 58 Pac. 1060; Estate of Marshall, 118 Cal. 379, 50 Pac. 540; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578 (distinguishing Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411, on the ground that the stipulation thereon was not given until after the expiration of the time to appeal). See supra, § 137.

11. Palmdale Irr. Dist. v. Rathke, 91 Cal. 538, 27 Pac. 783.

12. Warner Bros. Co. v. Freud, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017.

13. Estate of More, 143 Cal. 493, 77 Pac. 407; Estate of Pearsons, 119 Cal. 27, 50 Pac. 929 (where appeal is premature or too late). And see supra, § 445.

14. Fairchild v. Daten, 38 Cal. 286.

15. Fairchild v. Daten, 38 Cal. 286; Lynch v. Dunn, 34 Cal. 518 (but holding that under the circumstances a motion presented at

miss for failure to file a transcript in time is premature if made before the expiration of the time for the filing of such transcript,[16] and is too late if made after the submission of the cause.[17]

It is pointed out in an earlier article that a conflict exists in the decisions as to the right of a personal representative—substituted in the trial court, but not in the appellate court—to move the dismissal of an appeal against a deceased respondent for failure to file the transcript in time.[18]

A motion to dismiss an appeal should be made upon the day noticed for the hearing, or at the first opportunity during the session of the court. If not so made, the motion lapses, and it cannot be revived at a subsequent session.[19]

Where made.—A motion to dismiss an appeal can be made only in the court to which an appeal is taken.[20] The taking of an appeal deprives a trial court of jurisdiction of matters embraced in the appeal,[1] and hence, it has no jurisdiction to dismiss the appeal.[2]

§ 448. **Notice of Motion.**—Unless notice is waived, a motion to dismiss must be made upon notice, so that the

argument on merits was not too late); Newman v. Maldonado, 3 Cal. Unrep. 540, 30 Pac. 833.

16. McGrath v. Hyde, 71 Cal. 454, 12 Pac. 497 (motion to dismiss for failure to file transcript made before settlement of bill of exceptions); Turner v. Dewey (Cal.), 30 Pac. 1016 (where a motion on ground that transcript was not filed was made before settlement of bill of exceptions); Hofer v. Grundy, 24 Cal. App. 686, 142 Pac. 102, holding motion premature if made within forty days after the filing, by stipulation, of a substituted appeal bond.

17. Cook v. Klink, 8 Cal. 347.

18. See ABATEMENT AND REVIVAL, vol. 1, pp. 64, 65.

But a motion for dismissal on the ground that the notice of appeal was served upon the attorney of respondent after the death of the latter may be made before the substitution of the representative. See supra, § 445, note 4.

19. Lamet v. Miller, 68 Cal. 521, 9 Pac. 669.

20. Engelken v. Justice's Court, 31 Cal. App. Dec. 730, 189 Pac. 298.

1. See supra, § 178.

2. Younger v. Pagles, 60 Cal. 517; Lewis v. Lapique, 26 Cal. App. 448, 147 Pac. 221.

appellant may not be taken by surprise, and may have an opportunity to meet the motion. While under the earlier practice an appellant was entitled to five days' notice of motion to dismiss an appeal,[3] under the present rules it is required that the notice shall be ten days, unless for good cause shown the time is shortened by the court.[3a]

Requisites and sufficiency.—Section 1010 of the Code of Civil Procedure requiring notices of motion to state the grounds upon which it will be made is applicable to notices of motion to dismiss appeals.[4] When the objection is one which may be obviated by the appellant, it is necessary to specify in the notice of motion the ground upon which the dismissal will be asked;[5] and the notice will be strictly construed against any attempt to mislead an opponent or to ambush an attack which with timely notice could be guarded against.[6] When, however, the objection is one which goes to the jurisdiction of the appellate court to entertain the appeal, it may be advanced, although not specified in the notice of motion.[7]

When the motion is made on the ground that the appellant has failed to furnish the requisite papers, the notice must designate or point out what papers requisite to a consideration of the appeal are omitted from the record.[8] Where the attack is upon the undertaking, the notice

3. Judson v. Love, 35 Cal. 463 (holding, however, that where, in the absence of such notice and service, the motion is submitted on the merits, and the objection is taken for the first time in the brief of counsel, the objection will be deemed waived).

3a. Supreme court rule XX.

4. Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050.

5. Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511 (an objection that the folios of the transcript on file are not numbered should be distinctly specified in the notice of motion to dismiss in order to give the appellant an opportunity to amend the defect).

6. Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418; Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48.

7. Continental Bldg. & Loan Assn. v. Beaver, 6 Cal. App. 116, 91 Pac. 666.

8. Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050.

should point out the defects therein,[9] unless the defect is incurable and goes to the jurisdiction of the appellate court. In the latter case it is sufficient to state generally that no valid or sufficient undertaking on appeal has been given or filed by said defendant on said appeal.[10] A notice sufficiently indicates the ground upon which the motion will be made, where the notice is based upon the usual clerk's certificate and an affidavit showing that no transcript has been served upon the respondent.[11] Where several appeals have been taken in a cause, the motion must be certain as to which appeal it attacks.[12] But clerical errors in the notice of motion will not vitiate it.[13]

§ 449. **Certificate and Affidavits.**—A motion to dismiss an appeal for a failure to file the transcript within the prescribed time is made upon the certificate of the clerk of the lower court provided for in subdivision 1 of rule VI of the supreme court.[14] On motion to dismiss the appeal on any other ground, the moving papers consist of such certificate of the clerk or of affidavits, or both such certificate and affidavits.[15] Copies of the moving papers, except the transcript, are required to be served with the notice of motion.[16]

Counter-affidavits.—An appellant may file affidavits in opposition to a motion to dismiss his appeal,[17] and if affi-

9. Bernard v. Sloan, 138 Cal. 746, 72 Pac. 360 (the court will not examine the undertaking critically to discover some possible defect not pointed out).

10. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747.

11. Bell v. Southern Pacific R. R. Co., 137 Cal. 77, 69 Pac. 692.

12. De la Cuesta v. Calkins, 5 Cal. Unrep. 163, 41 Pac. 1098.

13. Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650.

14. See supra, § 324, as to sufficiency of certificate of clerk. The clerk of the appellate court may refuse to file the certificate until payment of his fees. Bolander v. Gentry, 36 Cal. 127.

15. Supreme court rule VI, subd. 2. See supra, § 444, as to certificate where dismissal is upon stipulation.

16. Supreme court rule VI, subd. 3.

17. Judson v. Love, 35 Cal. 463. See Howse v. Norwich Union Fire Ins. Soc., 10 Cal. App. 712, 103 Pac. 156, holding affidavit excusing default in filing transcript to

davits so filed are not contradicted, they must be held to be true.[18]

Additional certificates and affidavits.—The certificate is merely evidence of certain facts which the respondent is required to present on the hearing of the motion, and there is no reason why an amended certificate should not be considered if it is material. A respondent's request to file an additional certificate before the motion is heard is not an abandonment of his right to be heard on the original certificate, but merely an offer to produce additional evidence to overcome the appellant's objections.[19] An application to file additional affidavits made after the hearing of the motion to dismiss may be denied.[20]

§ 450. Hearing and Determination.—As against a contention that the judgment or order appealed from was entered by the consent of the appellant, the court can only examine the record of the judgment for the purpose of determining its character. It cannot consider matters outside the record presented by ex parte affidavits.[1] And whether an appellant is entitled to have the execution of the judgment stayed until the determination of an appeal from an order denying a motion for new trial cannot be considered upon a motion to dismiss an appeal from the judgment.[2]

be evasive. But on motion to dismiss an appeal from a decree of distribution on the ground that the appellant consented thereto and accepted the benefits thereunder, affidavits impeaching the decree upon grounds not appearing of record cannot be considered while the decree remains as the judgment of the court. It seems that such matters should be presented to the trial court on a motion to set aside its decree. Estate of Shaver, 131 Cal. 219, 63 Pac. 340.

18. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176. See Brandenstein v. Johnson, 134 Cal. 102, 66 Pac. 86, holding positive statements in appellant's affidavit must prevail over mere inferences to the contrary from the respondent's affidavit.

19. Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895.

20. Isom v. Rex Crude Oil Co., 136 Cal. 454, 69 Pac. 1124.

1. Woodbury v. Nevada Southern Ry. Co., 120 Cal. 367, 52 Pac. 650.

2. Kirman v. Hunnewill, 91 Cal. 157, 27 Pac. 587.

Imposition of damages.—On a motion to dismiss, the appellate court will not look into the record to see if the appeal be frivolous and the case a proper one for the imposition of damages.[3] But where the uncontradicted affidavit of the respondent shows that the appeal was taken solely for delay, and that the right of appeal has been abused, the court may award damages on the dismissal thereof.[4] When the appellant does not appear in opposition to the motion, it must be assumed that a statement of the respondent as to the purpose of the appeal is correct.[5] However, a mere ex parte affidavit to the effect that the respondent has been informed and believes an appeal to be without merit does not authorize a conclusion that the appeal is frivolous, nor justify an imposition of damages.[6]

§ 451. Determination of Merits.—It is a rule of convenience for the expedition of business of the appellate court that it will not entertain a motion to dismiss involving an examination of the record in advance of the hearing on the merits.[7] If the questions involved in a motion

3. McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777. See Vaughn v. Werley, 62 Cal. 181, in which in dismissing an appeal for failure to file a transcript it was held that damages could not be awarded because in the absence of a transcript there was nothing from which to determine that an appeal was taken for delay.

4. McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777; Koelling v. Rutz, 108 Cal. 664, 41 Pac. 781; Duncan v. Grady, 99 Cal. 552, 34 Pac. 112; Buckley v. Stebbins, 2 Cal. 149; Chiafullo v. Schwab, 13 Cal. App. 152, 109 Pac. 36. See Pacheco v. Bemal, 2 Cal. 150, which seems to hold to the same effect.

5. Chiafullo v. Schwab, 13 Cal. App. 152, 109 Pac. 36.

6. Kirby v. Harrington, 2 Cal. Unrep. 740, 13 Pac. 218.

7. Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921; Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014; Melde v. Reynolds, 120 Cal. 234, 2 Pac. 491; Storke v. Storke, 111 Cal. 514, 44 Pac. 173; Randall v. Duff, 104 Cal. 126, 43 Am. St. Rep. 79, 37 Pac. 803; Howell v. Howell, 101 Cal. 115, 35 Pac. 443; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Green v. McMann, 79 Cal. 561, 21 Pac. 964; W. J. Somers Co. v. Smith, 31 Cal. App. Dec. 328, 188 Pac. 311; Altpeter v. Postal Telegraph-Cable Co., 21 Cal. App. 501, 132 Pac. 79; Estate of Sharp, 10 Cal. App. 1, 100 Pac. 1071.

involve the merits of a case and are such as should be determined upon the hearing of the case upon its merits, the court may deny the motion with the privilege of renewal at the hearing, or continue the motion until the hearing on the merits.[8] Since the rule is merely one of convenience, the appellate court may, however, depart therefrom and consider the questions presented, when the mere inspection of the record discloses that no relief can be given the appellant.[9]

The rule against entertaining motions to dismiss which involve the merits does not, as a rule, preclude an appellate court from entertaining a motion made upon the ground that the order appealed from is not an appealable one. While a determination of this question involves a

8. Ewing v. Richvale Land Co., 176 Cal. 152, 167 Pac. 876; Estate of West, 162 Cal. 352, 122 Pac. 953; Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526; Deiter v. Kiser, 158 Cal. 259, 110 Pac. 921; United Real Estate & Trust Co. v. Barnes, 157 Cal. 515, 108 Pac. 306; Quist v. Michael, 153 Cal. 365, 95 Pac. 658; Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027; Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014; Steen v. Santa Clara Valley Mill. & L. Co., 145 Cal. 564, 79 Pac. 171; Estate of Heaton, 139 Cal. 237, 73 Pac. 186; Estate of Kasson, 135 Cal. 1, 66 Pac. 871 (on appeal from an order denying a new trial, the court cannot dismiss on the ground that judgment was given against the appellant by default and that a motion for new trial was unauthorized, as this involved an examination of the merits); Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120; Jarman v. Rea, 129 Cal. 157, 61 Pac. 790; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Kirsch v. Derby, 93 Cal. 573, 29 Pac. 218; Latham v. Los Angeles, 83 Cal. 564, 23 Pac. 1116 (where a determination of the question whether a party not served with notice of appeal was an adverse party involved a determination of the merits); Foscalina v. Doyle, 48 Cal. 151; Darlington v. Butler, 7 Cal. Unrep. 246, 85 Pac. 931 (continuing motion); Gardner v. Stare, 6 Cal. Unrep. 777, 66 Pac. 3; Leonis' Estate v. Leffingwell, 6 Cal. Unrep. 219, 55 Pac. 897 (continuing motion until hearing); Ohlandt v. Joost, 6 Cal. Unrep. 10, 53 Pac. 213; Estate of Williams, 4 Cal. Unrep. 511, 36 Pac. 6 (denying motion); Bloom v. Michigan Salmon Min. Co., 11 Cal. App. 122, 104 Pac. 324; Mannix v. Tryon, 2 Cal. App. 609, 84 Pac. 278 (continuing motion until hearing with permission to respondent to include points in support of the motion in his brief, and to the appellant to reply thereto).

9. Hibernia Savings & Loan Soc. v. Doran, 161 Cal. 118, 188 Pac. 526.

comparison of the record containing the order appealed from with the statute prescribing what orders are appealable,[10] ordinarily it is only the order itself and the pleadings which need be considered in disposing of the motion in such case.[11]

§ 452. Avoiding Dismissal Where Transcript or Brief is not Filed in Time.—Rule V of the supreme court, after providing that a failure to file the transcript of the record or appellant's points and authorities within the time limited is ground for dismissal, provides further that if the transcript, or points and authorities, though not filed within the time prescribed, be on file at the time notice of motion to dismiss is given, that fact shall be sufficient to answer to the motion.[12] Under this rule the right of a respondent to a dismissal is determined by the facts as they exist at the time the notice of motion is given. If there is a transcript or brief on file at that time, this fact of itself prevents a dismissal of the appeal under rule V.[13] If no transcript or brief is on file at the time the notice is given, and no extension of time is applied for or granted, the right of the respondent to a dismissal is not defeated by the mere filing of a transcript or brief subsequently thereto.[14] To avoid a dismissal in such case, the appel-

10. Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014; Centerville & K. Irr. Ditch Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813 (per Harrison, J.); Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103 (the order itself must be examined).

11. Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014.

12. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895; Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Page v. Latham, 60 Cal. 601; Hill v. Finnigan, 54 Cal. 311.

13. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006; Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895; Carter v. Paige, 77 Cal. 64, 19 Pac. 2. The filing of a transcript pursuant to a stipulation is a sufficient answer to a motion to dismiss. Fisher v. Western Fuse & Explosives Co., 12 Cal. App. 299, 107 Pac. 332.

14. Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; Carter v. Paige, 77 Cal. 64, 19 Pac. 2; Page v. Latham, 60 Cal. 60 (under a former rule of court authorizing the granting of an extension of time only for twenty days after the pre-

lant must by affidavit show some sufficient excuse calling for a relaxation of the rule.[15] The appeal will be dismissed even when the transcript or points and authorities, though filed on the same day as that on which the notice of motion to dismiss is given, are filed subsequently in point of time,[16] unless, as has been suggested, circumstances calling for a relaxation of the rule are shown.[17] It is true that for some purposes a day is regarded as an indivisible unit, and that in cases where such rule properly applies, courts refuse to look into fractions of a day for the purpose of determining which of two acts was first in point of time; but when the question whether one legal right shall have priority over another depends upon the order of events occurring on the same day, this rule is necessarily departed from.[18] When, however, there is

scribed time, the giving of leave to file a transcript after the expiration of the twenty days is not equivalent to an extension of time, and an appeal will be dismissed notwithstanding a transcript is filed pursuant to such leave, after the giving of notice of motion to dismiss, but before the hearing thereon); Welch v. Kenney, 47 Cal. 414; Santa Rosa Bank v. Striening, 1 Cal. App. 515, 82 Pac. 551. But see Jaques v. Board of Supervisors, 22 Cal. App. 627, 135 Pac. 686, and Poole v. Grand Circle, W. O. W., 17 Cal. App. 229, 119 Pac. 201, holding that the filing of the transcript "prior to the hearing of the motion" removes the objection, and the motion to dismiss will be denied. These cases are based upon authorities citing rule XV of the supreme court, which authorizes the correction of "defects in the transcript" prior to the hearing of the motion, and cases decided thereunder, and erroneously, it is believed, extend this rule to a "failure to file" a transcript. The rule as announced by the supreme court is stated in the text.

15. See supra, § 441.

16. Ward v. Healy, 110 Cal. 587, 42 Pac. 1071; Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Hoyt v. San Francisco & N. P. R. R. Co., 87 Cal. 610, 25 Pac. 160, 1066.

The fact that the document is in the office of an express company in transit to the clerk for filing when the notice of motion to dismiss is given does not save the appellant's rights, as this is not the equivalent of filing, within the rule, but it is a circumstance to be taken into consideration in relaxing the rule. Ward v. Healy, 110 Cal. 587, 42 Pac. 1071.

17. See supra, § 441.

18. Hoyt v. San Francisco & N. P. R. R. Co., 87 Cal. 610, 25 Pac. 160, 1066. See TIME.

some controversy between the parties as to which act was prior in point of time, the appellate court will not look into fractions of a day for the purpose of dismissing the appeal.[19]

Effect of amendment of motion.—When a motion to dismiss an appeal from a judgment is amended so as to include an appeal from an order denying a new trial, the motion to dismiss the appeal from the order cannot be regarded as having been made until notice is given of the amendment to the motion, and if the transcript is filed on that day, and the respondent does not show that his notice was given prior to its filing, it is a sufficient answer to the latter motion.[20]

Effect of defects in transcript or brief filed.—To avoid a dismissal under this rule it is not necessary that the transcript or brief be perfect and unobjectionable. A transcript which purports to contain a record of all the proceedings which is sought to be reviewed on the appeal is sufficient to avoid a dismissal, although it may contain defects which are curable under rule XIV by a suggestion of a diminution of the record.[1] So, also, a court will not examine a document purporting to be the points and authorities of the appellant to determine its sufficiency to avoid a dismissal. Where there are two appeals taken in an action, the court will not even examine the document to ascertain if it is applicable to both.[2]

§ 453. Avoiding Dismissal Where Transcript or Undertaking is Defective.—Section 954 of the Code of Civil Procedure providing that

"If the appellant fails to furnish the requisite papers, the appeal may be dismissed,"

19. Hill v. Finnigan, 54 Cal. 311, distinguished in Hoyt v. San Francisco & N. P. R. R. Co., 87 Cal. 610, 25 Pac. 160, 1066.

20. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006.

1. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006.

2. Gregory v. Diggs, 108 Cal. 123, 41 Pac. 34.

is to be construed in connection with rules XIV and XV of the supreme court authorizing the correction of any error or defect in the transcript by producing a certified copy of the omitted record, and providing that objections to the right of an appellant to be heard or any exception to the sufficiency of the transcript which might be cured upon the suggestion of a diminution of the record shall not prevail unless the appellant shall fail to file such additional record after having been notified as therein provided. Thus construed, section 954 does not give the respondent absolute right to a dismissal of an appeal upon a mere showing that the record as filed is defective, but only authorizes a dismissal if the appellant fails to furnish the requisite papers after the suggestion of diminution has been made.[3] If the appellant, at the hearing of the cause produces a properly authenticated transcript, the objection is obviated, and the motion to dismiss will be denied.[4] The respondent cannot avoid the application of this rule and require an immediate dismissal by making an affidavit that the defect complained of cannot be cured by a suggestion of diminution of the record.[5] The avoidance of a dismissal where the undertaking on appeal is defective has already been discussed.[6]

3. Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103.

4. Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214 (transcript not properly authenticated); Hellings v. Duval, 119 Cal. 199, 51 Pac. 335 (where the certificate was informal); Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Knowlton v. Mackenzie, 110 Cal. 183, 42 Pac. 580 (where the transcript failed to show service of notice of appeal); Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; People ex rel. Van Valer v. Jacobs, 2 Cal. Unrep. 672, 12 Pac. 222. See Kimple v. Conway, 69 Cal. 71, 10 Pac. 189, dismissing an appeal unless the appellant furnish the missing papers at the hearing of the cause.

On motion to dismiss for want of undertaking, the appellant may suggest a diminution of the record, and obtain an order directing the clerk of the lower court to certify a copy of the undertaking to the appellate court. Wakeman v. Coleman, 28 Cal. 58.

5. De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787.

6. See supra, §§ 161–163.

§ 454. Effect of Determination—Successive Motions.—A dismissal of an appeal removes the cause from the jurisdiction of the appellate court. Briefs filed cease to be records after the dismissal,[7] and all orders made in the cause by the appellate court fall with the dismissal of an appeal for want of a case to support them.[8] Section 955 of the Code of Civil Procedure provides that

"The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."[9]

A dismissal not stated to be without prejudice operates as an affirmance where the dismissal is for want of prosecution,[10] by consent,[11] and probably where the dismissal is made upon the ground of noncompliance with the statute regulating the taking of appeals.[12] But it has been held that a dismissal of an appeal does not operate as an affirmance where the dismissal is made upon the ground that the appeal was prematurely taken.[13] A dismissal leaves the judgment appealed from as originally pronounced.[14] At most, it prevents a second appeal,[15] and relieves the order or judgment from attack for error or

7. A motion to strike a brief from the files, made after a dismissal of an appeal, will not be entertained, as the brief ceases to be a record after the dismissal. Duncan v. Times-Mirror Co. (Cal.), 42 Pac. 148.

8. Home for Care of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119 (order substituting parties).

9. Taylor v. Albion Lumber Co., 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348; Estate of Friedman, 173 Cal. 411, 160 Pac. 237; Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176; Foster v. Smith, 115 Cal. 611, 47 Pac. 591 (per Beatty, C. J., specially concurring); Howell v. Howell, 101 Cal. 115, 35 Pac. 443; In the Matter of King, 29 Cal. App. Dec. 825, 184 Pac. 964; Thomas v. Superior Court, 6 Cal. App. 629, 92 Pac. 739.

10. See supra, § 7.

11. Chase v. Beraud, 29 Cal. 138; Spaeth v. Ocean Park Realty M. & I. Co., 16 Cal. App. 329, 116 Pac. 980.

12. See supra, § 7.

13. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64.

14. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Shartzer v. Love, 40 Cal. 93.

15. See supra, § 7.

irregularity which could have been taken advantage of upon appeal. It cannot, however, impart validity to a judgment which is void upon its face.[16]

Successive motions.—While the court may upon a proper state of facts allow a renewal of a motion to dismiss once decided,[17] in the absence of such leave a renewal of the motion upon the same facts at the hearing of the appeal on the merits has nothing to commend it to the discretion of the appellate court.[18] And where the motion is refused in whole or in part, or is granted conditionally, section 182 of the Code of Civil Procedure precludes a renewal of the motion before the same court.[19]

§ 455. Vacation and Reinstatement. — Formerly, the rules of the supreme court authorized the reinstatement, for good cause shown, on notice to the opposite party, of appeals dismissed on ex parte motion on the ground that the transcript of the record was not filed within the time prescribed.[20] On motions of this character it was required that the appellant show by affidavit, not only that there has been no want of diligence on his part in prosecuting the appeal, and that, in the opinion of counsel at least, there are substantial errors in the record which ought to be corrected by the court,[1] but also that the appeal has been taken in good faith.[2] If no such motion was made, the dismissal became final.[3]

16. Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537.

17. See Ford v. Doyle, 44 Cal. 635, so holding in the case of a motion for an alias writ of execution.

18. Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116; Reed v. Allison, 54 Cal. 489; Murphy v. Stelling, 1 Cal. App. 95, 81 Pac. 730. See Dorn v. Baker, 92 Cal. 194, 28 Pac. 225, holding that where after the submission of a motion to dismiss, another motion is made upon the same ground and denied, the first motion will also be denied.

19. Hellings v. Duvall, 131 Cal. 618, 63 Pac. 1017 (where the motion was granted as to one respondent and denied as to the other).

20. Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323; Stark v. Barnes, 2 Cal. 162.

1. Dorland v. McGlynn, 45 Cal. 18; Hagar v. Mead, 25 Cal. 598.

2. Hagar v. Mead, 25 Cal. 598.

3. Rowland v. Kreyenhagen, 24 Cal. 52.

Vacating order.—An order vacating a dismissal of an appeal obtained upon a stipulation of counsel for respondent in ignorance of the dismissal will be set aside on his motion, where it is evident that the stipulation would not have been signed had the facts been known.[4]

M. CALENDARS, HEARING AND REHEARING.

I. CALENDARS.

§ 456. In General.—Rule IV of the supreme court provides (in part) as follows:

"Thirty days before the commencement of a regular session a calendar therefor, including such pending cases as the court deems it expedient to place thereon, shall be prepared. Unless specially advanced by law or order of the court, cases shall be placed thereon in the order in which transcripts were filed, provided that the appellant's opening points and authorities are on file."[5]

Rule XVII provides:

"Criminal causes shall be placed at the head of the calendar, and shall be followed by such other cases as are preferred by law. Other causes shall be arranged on the calendar of the respective courts, as the chief justice of the supreme court, or the presiding justice of the district court of appeal, or the division thereof in which the cause is pending, respectively, may direct."[6]

Section 57 of the Code of Civil Procedure provides that:

"Appeals in probate proceedings and contested election cases shall be given preference in hearing in the supreme court, and be placed on the calendar in the order of their date of issue, next after cases in which people of the state are parties."

4. Noriega v. Knight, 20 Cal. 172.

5. See Himmelman v. Haskell, 45 Cal. 269, as to showing required of party moving under rule XV of rules of 1870 (37 Cal. 709) to place cause on calendar for default of adverse party as to briefs.

6. Rule XVII. See supreme court rule XXXVII, as to order of hearing in appellate courts.

It has been held that to prevent the suspension of the payment of alimony for a long time, an appeal from an order allowing it will be placed on the next court calendar made up after the filing of the transcript.[7]

The clerk is not authorized, in the absence of a special order to that effect, to place a case upon the calendar for oral argument until points and authorities have been filed.[8] Until that time the respondent has a right to assume that the case will not be on the calendar for argument. If placed on the calendar in violation of this rule, the court will set aside any order of submission and strike the case from the oral argument calendar.[9]

A motion to place a cause on the calendar may be denied if the order appealed from is not an appealable order.[10]

Cause placed on wrong calendar.—While counsel may not be entitled to any specific notice that a case is set upon one of the calendars of the supreme court for hearing, they are entitled to assume that it will be placed upon the calendar for the proper district. If through a mistake of the clerk the cause is placed on the calendar of a wrong district and is argued in the absence of a party who had no notice of the setting of the case, the hearing and submission are irregular and will be set aside on motion of such party.[11] Causes improperly upon the calendar will be stricken therefrom.[12]

7. Langan v. Langan, 86 Cal. 132, 24 Pac. 852.

8. Garcia v. Brown, 146 Cal. 68, 79 Pac. 590. See Plant v. Smythe, 43 Cal. 42, holding under rule XV of the rules of 1870 (37 Cal. 709) a cause will not be placed on the calendar in accordance with stipulation of the parties until the transcript and briefs of both parties are filed.

9. Garcia v. Brown, 146 Cal. 68, 79 Pac. 590.

10. Grant v. Johnston, 45 Cal. 243.

11. Schmidt v. Union Oil Co., 168 Cal. 617, 144 Pac. 776.

12. Garcia v. Brown, 146 Cal. 68, 79 Pac. 590; Meley v. Boulon, 104 Cal. 262, 37 Pac. 931 (an appeal from a judgment or order not specified in the notice of appeal will be stricken from the calendar if improperly placed thereon); Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297.

Where an action is not within the appellate jurisdiction of the su-

§ 457. Changing Place of Cause on Calendar.—An appellate court has power over its calendars and the power in a proper case to change the position of a cause thereupon.[13] But it will not exercise its power in this respect, either upon the stipulation of the parties or upon motion of either party, except upon a showing of good cause therefor.[14] A motion to affirm a judgment on the ground that an appeal therefrom is without merit is in substance only a motion to advance the cause for hearing prior to its being reached in its order upon the calendar. To permit such a motion when there is in fact no good reason for such advancement would be unfair to other litigants whose appeals are entitled to priority in the matter of hearing.[15] The fact that an appeal was taken for delay is not ground for advancing the hearing of the cause.[16]

II. HEARING.

§ 458. Consolidation of Causes.—The supreme court will not consolidate suits brought upon distinct causes of action, especially when, by so doing, facts are incorporated in a cause which do not appear in the record and which were not in issue or established in the cause while in the court below.[17] The fact that causes were consolidated by

preme court, and the transcript contains nothing to show that an appeal has been taken, any order submitting the cause will be set aside and the case stricken from the calendar. Sweet v. Tice, 45 Cal. 71.

13. Supreme court rules XVII, XXXVII.

14. Wetmore v. San Francisco, 43 Cal. 37 (denying the motion to have cause placed at the foot of the calendar, although the parties had stipulated thereto); Gregory v. Keating, 2 Cal. Unrep. 865, 18 Pac. 389, holding that the showing made was insufficient to advance the hearing of the cause.

15. Chino Land & Water Co. v. Hamaker, 171 Cal. 689, 154 Pac. 850; Randall v. Duff, 105 Cal. 271, 38 Pac. 739.

16. Gregory v. Keating, 2 Cal. Unrep. 865, 18 Pac. 389.

17. Wallace v. Eldridge, 27 Cal. 495. See Davidson v. Roffy, 28 Cal. App. Dec. 525, 819, 180 Pac. 830, holding, on petition for modification of the judgment of the appellate court, that it cannot be successfully claimed that it was agreed in the lower court that two appeals were to be heard together when there is nothing in the record to show that such was the under-

order of a trial court upon consent of the parties will not entitle them to be considered together upon appeal, if there are separate motions for new trial upon grounds peculiar to the respective cases, separate bills of exceptions and separate appeals.[18]

§ 459. **Argument.**—Rule XIX of the supreme court provides as follows:

"No more than one counsel upon a side will be heard upon the oral argument, except when otherwise ordered; but each defendant, or intervener, who appeared separately in the court below may be heard through his own counsel, unless the court otherwise order. The counsel for each party shall be allowed only one hour, unless an extension of time is ordered before the argument begins."

Assignments not pressed at the oral argument do not require special notice.[19] And points raised for the first time on oral argument will not be considered.[20]

Waiver of argument.—When a cause is regularly placed on the calendar, and the parties fail to appear at the time fixed for argument, either in person or by attorney, they are deemed to have waived oral argument, and it is the practice to order the cause to be submitted on the briefs on file. A party who files a brief in support of his appeal, and accepts service of the respondent's reply brief, and who thereby appears in person, is assumed to know of the regular placing of the cause on the argument calendar and of the time fixed for argument, and is thereafter precluded from afterwards urging that the privilege of oral argument was denied him, and that there was no hearing of the cause.[1]

standing and there was no contention that both appeals should be construed together.

18. Harmon v. San Francisco & S. F. R. R. Co., 86 Cal. 617, 25 Pac. 124. See ACTIONS, vol. 1. p. 375.

19. Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

20. Johns v. Baender, 40 Cal. App. 790, 182 Pac. 55. See supra, § 424, as to review of questions first raised in the reply brief.

1. Philbrook v. Newman, 148 Cal. 172, 82 Pac. 772. See Hayes v. Hayes, 143 Cal. 596, 77 Pac. 452; Hale & Norcross S. M. Co. v. Fox,

It is provided in subdivision 2 of rule XXX of the supreme court that

"The submission of a cause to a department of the supreme court without oral argument shall be deemed to be a waiver of an oral argument of the same in bank, if for any reason the same is thereafter ordered to be heard in bank; and when the order that the cause be heard in bank is made, the same shall be at once submitted for decision, unless otherwise ordered by the court."

§ 460. Judicial Notice by Appellate Courts.—An appellate court can properly take judicial notice of any matter of which a court of original jurisdiction may properly take notice. In fact, a particularly salutary use of the principle of judicial notice is to sustain on appeal a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of necessary fact which is yet indisputable and a matter of common knowledge, and probably assumed without strict proof for that very reason.[2]

As to laws and matters dependent thereon.—An appellate court is bound to take judicial notice of the constitution and laws of the state.[3] It takes judicial notice of federal statutes and also of a state statute relating to a particular county.[4]

120 Cal. 261, 52 Pac. 499 (as to submission of cause under rule III of the rules of 1896). See Lightstone v. Laurencel, 2 Cal. 106, as to necessity for notice of argument under rules then in existence.

2. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223. See EVIDENCE.

3. Clark v. Los Angeles, 160 Cal. 30, 116 Pac. 722 (the supreme court will take judicial notice of an amendment to the charter of Los Angeles approved by the legislature); People v. Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305.

An appellate court will take judicial notice of the regular terms of the district courts as fixed by statute and of the contiguity of the counties composing the districts. Boggs v. Clark, 37 Cal. 236. See infra, § 461; as to judicial notice of court officers and judicial proceedings.

4. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448.

Of other matters.—The appellate court can take judicial notice that the United States is at war, when such is the fact.[5] And as a matter of public knowledge, it may take notice that the erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories and the like in public parks is common.[6]

An appellate court cannot judicially know that there is a regular communication by mail between the place of residence of the person who made service of the notice of appeal and the person served.[7] It cannot take judicial notice that any particular land was a part of the public domain at a specified date.[8] Neither can it take judicial notice that the climate of a particular place is at all times dangerous to one afflicted with chronic bronchitis, simply because it is dangerous at one season of the year.[9]

§ 461. As to State Officers and Judicial Proceedings.—An appellate court will take judicial notice as to who are the judges of the superior courts of the state, as section 1875 of the Code of Civil Procedure requires courts to take judicial notice of "the accession to office and the official signatures and seals of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States."[10] That a superior judge is a principal officer of the judicial department of the state cannot be doubted, and as such judicial notice must be taken of the accession to office of a supe-

5. Taylor v. Albion Lumber Co, 176 Cal. 347, L. R. A. 1918B, 185, 168 Pac. 348.

6. Spires v. City of Los Angeles, 150 Cal. 64, 11 Ann. Cas. 465, 87 Pac. 1026.

7. See supra, § 134.

8. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448.

9. Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836. See EVIDENCE as to judicial notice generally.

10. People v. Knoblock, 11 Cal. App. 334, 104 Pac. 1012 (a criminal case). See Williard v. Dillard, 86 Cal. 154, 24 Pac. 940, where on application for a writ of mandate the appellate court took judicial notice of the personnel and number of superior judges in a given county.

rior judge[11] as well as of his retirement from office.[12] The authority of the attorney general is derived from the constitution and laws of the state, and the appellate court is bound to take judicial notice of the extent of and the limitations upon his powers.[13] And an appellate court will take judicial notice of the fact that the county clerk is ex-officio clerk of the superior court, because it is so provided in the state constitution.[14]

Judicial proceedings.—When necessary for the administration of justice in a particular case, the court will take judicial notice of all previous and undisputed proceedings therein as appear of record certified or authenticated as required by law, and required by law to be on file or of record in the cause.[15] But, as a general rule, the court will not in one case take judicial notice of the record or proceedings in another case in the same court, unless there is in the record of the case before it some suggestion of such record or proceedings. This rule, however, is not an inflexible one, and should not be applied so as to prevent an appellate court from taking judicial notice in a pending appeal of its action in another case intimately connected with it and occurring subsequent to the taking of such appeal when it is evident that unless such notice is taken and acted upon injustice to the appellant will result.[16] Thus, upon an appeal from a judgment in a

11. People v. Knoblock, 11 Cal. App. 834, 104 Pac. 1012.

12. Kurtz v. Cutler, 178 Cal. 178, 172 Pac. 590; People v. Ebanks, 120 Cal. 626, 52 Pac. 1078 (a criminal case).

13. People v. Oakland Water Front Co., 118 Cal. 234.

14. Campbell v. West, 86 Cal. 197, 24 Pac. 1000.

15. In re Blythe, 108 Cal. 124, 41 Pac. 33 (citing Hollenbach v. Schnabel, 101 Cal. 312, 40 Am. St. Rep. 57, 35 Pac. 872; Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100, holding that the court may take judicial notice of a former decision in a cause for the purpose of ascertaining what instruction, if any, it is proper to give the court below).

16. Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 Pac. 704 (overruling Sewell v. Price, 164 Cal. 265, 128 Pac. 407. Angellotti, J., Sloss, J., and Shaw, J., specially concurring, were of the opinion that the doctrine of judicial notice was not involved, and that the real

creditor's action, the court will take judicial notice of the reversal of the original judgment upon which the creditor's action is based.[17] So, also, upon an appeal from a judgment in an action in which the pendency of another action is pleaded, the appellate court may judicially notice the dismissal of an appeal in such other action for the purpose of determining whether the judgment in the case before it should be reversed, affirmed or modified.[18]

While an appellate court will take judicial notice of its own records for some purpose, an appellant cannot in this way have his cause heard upon evidence not produced at the hearing below.[19] And on appeal from an order denying a change of venue, the appellate court cannot take judicial notice of the fact that the amount of damages claimed is greater than is likely to be allowed by a jury, or that the defendant will put in issue the amount of damages claimed, so as to justify the affidavit of merits.[20]

III. REHEARING.

Rehearing in Court Deciding Case.

§ 462. Nature of Rehearing and Power to Grant.—A petition for rehearing is a request to an appellate court to revise its action by correcting errors and modifying or setting aside its decision.[1] As stated in a comparatively recent case: "Petitions for rehearing are permitted by the rules of the court, for the purpose of correcting any error

question was whether the matters asserted might be brought before the court on motion and supported by evidence outside the record, and considered in disposing of the appeal); Collins v. Ramish, 28 Cal. App. Dec. 1065 (on petition for rehearing).

17. Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 Pac. 704.

18. Collins v. Ramish, 28 Cal. App. Dec. 1065 (on petition for rehearing).

19. Bertz v. Turner, 102 Cal. 672, 36 Pac. 1014.

20. Walling v. Williams, 60 Cal. Dec. 243, 192 Pac. 34.

1. 1 Ruling Case Law, 172.

which the court may have made in its opinion, or of enabling counsel to direct the attention of the court to matters presented at the argument, which may have been overlooked in the decision."[2]

Power to grant.—The constitution and the Code of Civil Procedure authorize the chief justice of the supreme court, with the concurrence of two associate justices or any four justices, to order a rehearing of a case in bank, within thirty days after judgment pronounced in department.[3] While the constitution expressly makes provision for a rehearing in bank after a decision in department, neither it nor the statute confers power upon the supreme court to direct a rehearing of causes decided in bank without a previous decision in department. But notwithstanding this fact, it is well settled that it has authority to grant a rehearing in such cases by virtue of its inherent power to modify and correct its judgments so long as they are under its control.[4] The power to grant rehearings was repeatedly exercised under the constitution of 1849,

2. San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 835.

3. Const., art. VI, § 2; Code Civ. Proc., § 44.

The constitutional provision is as follows: "The chief justice [of the supreme court] shall apportion the business to the departments and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made, it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a cause to be heard in bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices." Const., art. VI, § 2.

4. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134; Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742 (cited in Grangers' Bank v. Superior Court, 101 Cal. 198, 35 Pac. 642). See infra, § 570, as to authority over judgments.

and under the revisal of the article on the judicial department therein as effected by the amendment of 1862–63, both of which were silent upon the subject;[5] and it is well settled that this power exists under the constitution of 1879, although it does not mention rehearings of causes decided in bank without a previous decision in department. The power is not impliedly denied by the provision already referred to authorizing a rehearing in bank of cases decided in department, as this provision was necessary to define clearly the relations of the departments to the court.[6] It is true that it has been held that the right to petition for a rehearing should not be recognized in cases decided in department and afterwards in bank, but this decision, it has been said, does not relate to the power of the court, but rather to the right of the petitioner to a rehearing,[7] and second rehearings have been granted in such cases.[8]

§ 463. When Power must be Exercised.—The power to grant a hearing in bank of a cause determined in department must be exercised within thirty days after judgment is pronounced in department.[9] The power cannot be exercised afterwards, even though the last day falls on a Sunday or a holiday, as the supreme court is expressly excepted from the rule that no court must be open for the transaction of business upon holidays, and the constitution expressly provides that "the supreme court shall

5. Estate of Jessup, 81 Cal. 408, 6 L. A. R. 594, 22 Pac. 742; Mateer v. Brown, 1 Cal. 231; Grogan v. Ruckle, 1 Cal. 193.

6. Austin v. Pulschen, 112 Cal. 528, 44 Pac. 788; In re Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742 (on motion to vacate judgment); Bull v. Coe, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

7. Hegard v. California Ins. Co., 72 Cal. 535, 14 Pac. 359, (explained in Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742). Compare in this connection, Code Civ. Proc., § 45, to the effect that "every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments."

8. United Land Assn. v. Knight, 85 Cal. 448, 24 Pac. 818.

9. Grangers' Bank v. Superior Court, 101 Cal. 198, 35 Pac. 642; Durgin v. Neal, 82 Cal. 595, 23 Pac. 133; Adams v. Dohrmann, 63 Cal. 417.

always be open for the transaction of business."[10] Even if the petition is filed before the expiration of the thirty-day period, it cannot be granted where it does not reach the hands of the court until after the expiration of that period.[11] While an order granting a rehearing under this provision must be made and signed within thirty days after the judgment in department, it need not be filed within that time.[12] It is therefore unnecessary as a matter of law to correct an entry as to the time of filing of an order filed after the expiration of such time, but nevertheless it is advisable to correct such date to remove any doubt as to the validity of future proceedings of the court.[13]

In cases decided in bank.—The power to grant rehearings of cases decided in bank without a previous decision in department must be exercised within thirty days after the judgment in bank, as section 44 of the Code of Civil Procedure so provides.[14]

§ 464. Grounds for Rehearing.—While at one time rehearings were granted almost as a matter of course,[15] it is now necessary for an applicant therefor to satisfy the court that, owing to a mistake of law or a misunderstand-

10. Adams v. Dohrmann, 63 Cal. 417 (citing Code Civ. Proc., § 133).

11. Durgin v. Neal, 82 Cal. 595, 23 Pac. 133.

12. Estate of McNamara, 181 Cal. 82, 7 A. L. R. 313, 183 Pac. 552; Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

13. Estate of McNamara, 181 Cal. 82, 7 A. L. R. 313, 183 Pac. 552.

14. The provision of the code is as follows: "Every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing . . . granting a rehearing." Grangers' Bank v. Superior Court, 101 Cal. 198, 35 Pac. 642.

The court at first made a standing rule that no remittitur should issue short of ten days after judgment, except by consent. After the reorganization of the court under the revisal of the constitution in 1863, the time for filing petitions for rehearing was extended by rule of court and it was provided that no remittitur should issue until such time had expired. Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742.

15. Andrews v. Mokelumne Hill Co., 7 Cal. 330.

ing of facts, its decision has done an injustice in the particular case, or that the case is one where the principle involved is important, and a serious doubt exists as to the correctness of the decision.[16] In showing that the court misapprehended the facts in the record, it is not sufficient merely to point out that a material fact appearing in the record is not recited in the opinion, for whether all or a part or none of the facts are mentioned in the opinion, it is presumed that all the facts in the record bearing on the points decided have received due consideration.[17] Where a judgment has been affirmed for want of appearance or brief by the appellant, the supreme court will not order a rehearing in bank, even though the appellant makes a sufficient showing therefor, if it appears that it would be useless to do so for the reason that upon another hearing the same judgment must follow.[18] And it has been held that a rehearing need not be granted because of an oversight in considering a question which should have been considered, as such point may be disposed of on the petition for rehearing without ordering a rehearing.[19]

New points.—A party should present his whole case on the first hearing, and ought not to be permitted to argue it by piecemeal.[20] And it has been repeatedly held that where a case has been decided, a rehearing will not be granted for the purpose of considering a suggestion of

16. In re Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742.

17. Mulford v. Estudillo, 32 Cal. 131.

18. Estate of Montgomery, 59 Cal. 583; Bishop v. Glassen, 5 Cal. Unrep. 745, 12 Pac. 258; People v. Moran, 3 Cal. Unrep. 740, 31 Pac. 853. But see Patterson v. Ely, 19 Cal. 28, holding that where an order of submission of a cause on briefs allows the respondent a limited time after service of appellant's brief to reply thereto, a rehearing will be granted, without reference to the merits of the case, if no service of appellant's brief is made upon the respondent, and the court decided the case against him.

19. Keyes v. Nims, 30 Cal. App. Dec. 37, 184 Pac. 695.

20. Grogan v. Ruckle, 1 Cal. 193, 197.

error made for the first time in the petition therefor.[1] Under this rule, the court in deciding an appeal taken by the alternative method is justified in assuming that both parties have directed their attention to all the evidence relied upon in support of their contentions, and will not grant a rehearing to enable either party to present evidence not printed in their original briefs.[2] There is an exception to this rule where the matters urged in the argument for rehearing go to the jurisdiction of the court.[3] It has been contended that the rule should not prevail where the cause was submitted without oral argument at the request of the respondent. But as bearing on this point it has been held that if the parties are granted the right to and do file supplemental briefs, such briefs take the

1. A. F. Estabrook Co. v. Industrial Acc. Com., 177 Cal. 767, 177 Pac. 848; Prince v. Hill, 170 Cal. 192, 149 Pac. 578 (petition for hearing in bank after decision in department); San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 835; Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; Dougherty v. Henarie, 49 Cal. 686; Payne v. Treadwell, 16 Cal. 220 (on petition for rehearing a party cannot urge as error for the first time a refusal to give a requested instruction); Grogan v. Ruckle, 1 Cal. 193; People v. Bruggy, 3 Cal. Unrep. 415, 26 Pac. 965; Peterkin v. Randolph Marketing Co., 32 Cal. App. Dec. 632, 191 Pac. 947; Hammond v. San Mateo Planing Mill Co., 31 Cal. App. Dec. 149, 187 Pac. 144; Mott v. Wright, 30 Cal. App. Dec. 36, 184 Pac. 517, 522 ("However, in this case, we will consider the point raised"); Cain v. French, 25 Cal. App. 499, 144 Pac. 302; Flores v. Stone, 21 Cal. App. 105, 131 Pac. 348, 351, 352; Carstenbrook v. Wedderien, 7 Cal. App. 465, 94 Pac. 372; Nemo v. Farrington, 7 Cal. App. 443, 451, 94 Pac. 874, 877; Buhman v. Nickels & Brown Bros., 1 Cal. App. 266, 82 Pac. 85 (where a rehearing was asked by a defendant because of misstatements in his answer, but was denied on its appearing that in his brief he made no suggestion of such error, but relied wholly upon his demurrer to the complaint).

2. Peterkin v. Randolph Marketing Co., 32 Cal. App. Dec. 632, 191 Pac. 947.

3. Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62 (an appeal from an order denying a motion for new trial in which it was contended, on application for rehearing, that the matters reviewed thereon were reviewable only on an appeal from the judgment); In re Castle Dome Mining & Smelt. Co., 79 Cal. 246, 21 Pac. 746 (where notice of appeal was not served upon an adverse party).

place of oral argument, and points not urged either in the original or supplemental briefs cannot be raised for the first time upon a petition for rehearing.[4]

§ 465. Proceedings to Obtain—*Parties.*—A petition for rehearing cannot be filed by one who is not a party to the litigation and has no interest in behalf of or against either party thereto. A receiver appointed in a cause litigated by other parties has no standing or relation to the case which authorizes him to petition for a rehearing therein, even though he is served with notice of appeal.[5]

Petition and answer.—Unless perhaps the court so order upon its own motion, a cause cannot be reheard except upon a petition therefor.[6] The filing of a petition for a rehearing is not a matter of right. It is a privilege given by the court, governed and limited entirely by its rules, and a compliance therewith is essential.[7] Rule XXX of the supreme court provides as follows:

"Applications for a rehearing of a cause by the court rendering the judgment therein must be filed and a copy served on the adverse party, within twenty days after the judgment is pronounced. The adverse party may file an answer thereto not less than two days before the expiration of the time within which the rehearing can be granted. . . . The time herein prescribed shall not be extended, and the clerk must not file any such application or answer after the time therefor has expired. In civil cases such applications and answers must be printed."

It behooves the petitioner to include in his petition all the grounds upon which a rehearing is claimed, as grounds

4. Hammond v. San Mateo Planing Mill Co., 31 Cal. App. Dec. 149, 187 Pac. 144, on petition for rehearing.

5. People v. Union Bldg. & Loan Assn., 127 Cal. 400, 59 Pac. 692. See San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 835, where a petition was filed by counsel other than those whose names appeared in the record or who participated in the oral argument. The court did not pass upon their right to file the petition, however, but denied the petition for the reason that only grounds not presented on the original hearing were relied on.

6. Willson v. Broder, 24 Cal. 190.

7. Hanson v. McCue, 43 Cal. 178.

not included therein are deemed waived.[8] The provision as to the time for filing is mandatory, and cannot be avoided upon the ground of accident or excusable neglect, or it seems upon any other ground.[9] If the petition is not served upon the adverse party, it will be disregarded.[10]

§ 466. Order on Petition and Effect Thereof.—To grant a rehearing it is necessary that the order be concurred in by as many justices as are necessary to pronounce judgment,—that is to say, a rehearing of a case decided in bank can be granted only upon the concurrence of four justices.[11] Section 45 of the Code of Civil Procedure attempts to regulate the exercise of the power to grant rehearings in cases decided in bank, and to require such order to "be made in writing, signed by five justices." But this act is unconstitutional in so far as it requires the concurrence of more than four justices, as under the constitution a majority of the supreme court, consisting of four, may decide any matter within its jurisdiction. While the legislature has undoubted power to regulate the exercise of the power to grant rehearings, it has no power to take away or defeat the exercise of this jurisdiction. So, also, upon the principle of stare decisis, it has been held that a rehearing in such a case may be granted by an order of court entered upon its minutes, notwithstanding the statute.[12] The latter question, however, is now gov-

8. Willson v. Broder, 24 Cal. 190.

9. Hanson v. McCue, 43 Cal. 178 ("We can conceive of no case in which the time for filing a petition for rehearing can be enlarged, or the failure excused, under the positive prohibition of the rule"). See Ferris v. Coover, 10 Cal. 589, 633, holding the employment of new counsel after decision rendered is not a ground for an extension of time.

10. Brooks v. Union Trust & Realty Co., 146 Cal. 134, 79 Pac. 843.

11. Luco v. De Toro, 88 Cal. 26, 11 L. R. A. 543, 25 Pac. 983. See Reeve v. Colusa Gas & Elec. Co., 151 Cal. 29, 91 Pac. 802, as to authority of justice pro tempore to act upon petition.

12. Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742 (on petition to vacate judgment).

erned by subdivision 1 of rule XXVIII of the supreme court, which provides as follows:

"All orders of the supreme court granting rehearings, or for hearing in bank causes decided in departments, or for hearing in the supreme court after decision in a district court of appeal, shall be signed by the members of the court assenting thereto, and filed with the clerk."

Where court is equally divided.—If the justices composing the court are equally divided in opinion, a rehearing will be denied. The rule in this respect seems to be that where the motion is such as to make an affirmative decision indispensable to the further progress of the action, the action must stop in case of an equal division.[13]

Effect of rehearing.—The effect of an order granting a rehearing is to vacate the judgment first rendered,[14] and the opinion previously delivered. Until reaffirmed, the opinion does not have the force of an adjudication, and is entitled to no more consideration than the briefs of counsel. The opinion subsequent to the reargument constitutes the exposition of the law applicable to the facts of a case, and the only one to which the attention of the court can be directed.[15] This is true though the order granting such rehearing limited the argument to a single question. Such limitation means no more than that the court is satisfied that the arguments and briefs upon the other points fully cover them.[16]

13. Ayres v. Bensley, 32 Cal. 632. See infra, § 576, as to equal division as an affirmance.

14. Miller & Lux v. James, 180 Cal. 38, 179 Pac. 174, 175. Const., art. VI, § 2.

15. Welton v. Cook, 61 Cal. 481; Argenti v. San Francisco, 16 Cal. 255, at 276, per Field, C. J. (on petition for rehearing). See Poppe v. Athearn, 42 Cal. 606, where the reporter's note says: "After a rehearing the first opinion is understood to be no longer the opinion of the court, unless it is adopted in the subsequent opinion."

16. Miller & Lux v. James, 180 Cal. 38, 179 Pac. 174, 175.

Rehearing in Supreme Court of Causes Decided by Appellate Courts.

§ 467. In General.—The constitution confers upon the supreme court power to order a rehearing before itself of causes decided by a district court of appeal. The provision is as follows:

"The supreme court shall have power . . . to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made . . . within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced."[17]

The expiration of said period of thirty days without the making of an order by the supreme court ends its power in this regard and renders the judgment of the district court of appeal final for all purposes.[18] A mere modification of the opinion made upon the denial of a petition for rehearing in a district court of appeal does not, however, affect the finality of the judgment, so as to authorize the granting of an application for transfer after the lapse of sixty days from the giving of the judgment of the district court.[19]

Number of justices who must concur.—To make an order for a hearing in the supreme court after a decision in a district court of appeal, there must be a concurrence therein of a majority of the members of the supreme court, namely, four justices.[20] The uniform practice upon

17. Const., art. VI, § 4. See COURTS for discussion of transfer of cause before decision in appellate court.

18. People v. Ruef, 14 Cal. App. 576, 625, 114 Pac. 48, 54; National Bank v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 664, 84 Pac. 466, 468.

19. National Bank v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 664, 84 Pac. 466, 468.

20. People v. Ruef, 14 Cal. App. 576, 626, 114 Pac. 48, 54. See constitutional provision, supra.

such application as well as upon applications for hearing before the court in bank after decision in department, and for rehearing in bank after decision in bank, is for the justices to meet in consultation for their consideration. Though there is a sufficient concurrence where a justice, who for any reason will not be present at such consultation, affixes his signature to the order granting a hearing and rehearing, provided that he does not prior to the concurrence of three other justices withdraw his consent, or is not at the time of such concurrence for some reason disqualified to act, if, however, he should be absent from the state at that time and until after the expiration of the thirty-day period in which such order might be made, he is disqualified to act, and an order assented to only by him and three other justices is void.[1]

§ 468. When Transfer will be Ordered.—The provision of the constitution authorizing the supreme court to grant a hearing before it of causes decided by a district court of appeal does not give a right of appeal or anything equivalent thereto, but merely confers upon the supreme court a purely discretionary power to be exercised for the purpose of securing uniformity and harmony in decisions.[2] When an appeal is properly taken to the district court of appeal in a case in which it has appellate jurisdiction under the constitution, a rehearing in the supreme court will be granted only when error appears upon the face of the opinion of the appellate court, or when a doubtful and important question is presented upon which the supreme court desires to hear further argument. In such a case a denial of a petition for rehearing might establish a mischievous precedent.[3] The supreme court

1. Brown v. Northern California Power Co., 14 Cal. App. 651, 661, 114 Pac. 54, 74; People v. Ruef, 14 Cal. App. 576, 625, 114 Pac. 48, 54; Regan v. Superior Court, 14 Cal. App. 572, 114 Pac. 53, 72.

2. In re Wells, 174 Cal. 467, 163 Pac. 657; People v. Davis, 147 Cal. 346, 81 Pac. 718.

3. People v. Davis, 147 Cal. 346, 81 Pac. 718; Bissig v. Johnston Organ & P. Mfg. Co., 36 Cal. App.

will not grant a hearing to ascertain whether or not the facts involved were accurately stated, and considered in the opinion of the appellate court, as this would be in effect to allow an appeal to the supreme court.[4] But in causes properly appealed to the supreme court and referred to the district court for hearing and decision, the rule is different. In such causes, if it is contended that the case stated in the opinion of the district court differs materially from the case as it appears in the record, the supreme court feels bound to look into the record to see whether anything deserving consideration has been overlooked in deciding the case, or any of the facts misconceived in material particulars. If so, a rehearing is ordered notwithstanding the opinion of the district court may be correct on its face, because the complaining party has a right to the opinion of the supreme court upon the precise case shown by the record.[5]

New points.—On a petition after a decision by a district court of appeal for a rehearing in the supreme court, the petitioner cannot ask in effect for a first hearing of a question which should have been first determined in the district court of appeal.[6]

127, 171 Pac. 816; California Sav. & Com. Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395; People v. Slaughter, 33 Cal. App. 365, 165 Pac. 44; People v. Turner, 29 Cal. App. 193, 156 Pac. 381; People v. Bose, 28 Cal. App. 743, 153 Pac. 965; Hughes v. Chung Sun Tung Co., 28 Cal. App. 371, 374; People v. Vaughn, 25 Cal. App. 736, 147 Pac. 116, 117; Rauer's Law & Collection Co. v. Berthiaume, 21 Cal. App. 670, 675, 132 Pac. 596, 833; Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440 (by supreme court on petition for rehearing).

4. People v. Davis, 147 Cal. 346, 81 Pac. 718; Rauer's Law & Collection Co. v. Berthiaume, 21 Cal. App. 670, 675, 132 Pac. 596, 833; Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440 (on petition for rehearing).

This rule is confined to appeals and has never been extended to original proceedings instituted in district courts of appeal. Rockridge Place Co. v. City Council, 178 Cal. 58, 172 Pac. 1110.

5. Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440 (by supreme court on petition for rehearing).

6. Brown v. Coffee, 17 Cal. App. 381, 386, 121 Pac. 309, 311 (by supreme court in denying rehearing); Nemo v. Farrington, 7 Cal.

§ 469. Proceedings and Effect of Order Thereon.—Rule XXX of the supreme court provides as follows:

"Applications after a judgment of a district court of appeal has become final, for an order that the cause be heard and determined by the supreme court, must be accompanied by a copy of the opinion of the district court of appeal, showing the date of the filing thereof, and must be filed and a copy served on the adverse party, within ten days after the judgment of the district court of appeal has become final therein. The adverse party may file an answer thereto not less than ten days before the time for making such order for hearing in the supreme court will expire. . . . The time herein prescribed shall not be extended, and the clerk must not file any such application or answer after the time therefor has expired. In civil cases such applications and answers must be printed."

A petition inadvertently filed after the expiration of the prescribed time will be stricken from the files.[7] Rule XIII of the supreme court provides for the transfer of the record on filing of the petition, if such record is prepared under the alternative method.

Effect of denial of rehearing.—A denial of an application for a transfer of a case decided by a district court of appeal is not to be taken as an expression of any opinion by the supreme court or as equivalent thereto, in regard to any matter of law involved in the case and not stated in the opinion of the court, nor as an affirmative approval of the propositions of law laid down in such opinion. The refusal simply signifies that the court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case.[8]

App. 443, 451, 94 Pac. 874, 877 (by supreme court in denying a hearing).

7. Hewlett v. Beede, 7 Cal. Unrep. 246, 83 Pac. 1089.

8. People v. Davis, 147 Cal. 346, 81 Pac. 718; Estate of Campbell, 12 Cal. App. 707, 108 Pac. 669, 676 (per Shaw, J., dissenting from a denial of a rehearing).

N. REVIEW.

I. SCOPE AND EXTENT OF REVIEW.

General Principles.

§ 470. Review Generally.—The function of an appellate court is to review the action of an inferior court in rendering the judgment or making the order from which an appeal is taken.[9] In its review of the action of the trial court an appellate court is bound by the record. It cannot consider matters outside the record,[10] neither can it ordinarily consider or review matters not raised or considered in the trial court.[11] It cannot consider pleadings which have been withdrawn,[12] or have been superseded by amendment.[13] So, also, it cannot review a special defense, which the trial court expressly refrained from passing upon,[14] or evidence which has been excluded,[15] or matters happening after the entry of judgment, as a rule.[16] In determining whether evidence supports the findings, the court cannot consider affidavits which are not evidence touching the facts found.[17]

9. People's Home Savings Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

10. See supra, § 229 et seq.

11. See supra, § 67.

Since an appellate court takes the case as made by the trial court, it cannot examine into the merits of a tender which the defendant desires to make for the purpose of stopping the running of interest. Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308.

12. Swain v. Burnette, 76 Cal. 299, 18 Pac. 394 (demurrer).

13. Bray v. Lowery, 163 Cal. 257, 124 Pac. 1004; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715.

An appellant cannot urge as error an order overruling his demurrer to a pleading, where an amended pleading was afterwards filed by leave of court and this was not met by demurrer. Marsh v. Lapp, 180 Cal. 231, 180 Pac. 533.

14. Quint v. McMullen, 103 Cal. 381, 37 Pac. 381.

15. See infra, § 473.

16. See infra, § 474.

17. Kurze v. Douglas, 26 Cal. App. 186, 146 Pac. 197; Eddy v. American Amusement Co., 21 Cal. App. 487, 132 Pac. 83.

An appellate court cannot determine questions of fact,[18] or disturb the exercise of the trial court's discretion in the absence of an abuse thereof.[19] It will not ordinarily review questions which are not pressed in the briefs or argument,[20] or which are waived by stipulation[1] or which are otherwise waived or abandoned. On the other hand, an appellate court is not limited in its review to the questions raised by counsel, or required to notice all the points taken by appellant's counsel or to follow his line of argument.[2] But it is at liberty to decide a case upon any points that its proper disposition may require, whether raised by counsel or not.[3]

Issues of fact in law and equity.—It is thoroughly settled in California that the mode of reviewing the action of a trial court upon an issue of fact is the same in cases formerly denominated cases at law and cases once called cases in equity.[4]

Theory of case.—It is well established that the case on appeal must be decided on the same theory on which it was tried in the court below.[5] Where an issue is tacitly accepted by all the parties as properly presented and as the only issue, the appellate court will proceed upon the same

18. See infra, §§ 539–554.

19. See infra, §§ 527–538.

20. Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 175 Pac. 690. See supra, §§ 419, 423.

1. See infra, § 495.

Where counsel stipulate that certain questions are the only points involved, other questions will not be considered. Scott v. Dyer, 54 Cal. 430.

2. American Nat. Bank v. Donnellan, 170 Cal. 9, Ann. Cas. 1917C, 744, 148 Pac. 188; Holmes v. Rogers, 13 Cal. 191 ("An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them.")

3. See supra, § 420.

4. Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393; Hallock v. Jaudin, 34 Cal. 167. See Still v. Saunders, 8 Cal. 281; Grayson v. Guild, 4 Cal. 122, as to review in chancery cases in former procedure.

5. Lugiani v. Landau Economic Syphon Co., 38 Cal. App. 146, 175 Pac. 648. See supra, § 68. And see, generally, 2 Ruling Case Law, 183.

theory,[6] and the parties will not be allowed in such court for the first time to say that there was no such issue.[7] So, also, an appellate court will assume the existence of facts which were assumed to exist in the court below, notwithstanding the fact that they were put in issue by the pleadings.[8]

§ 471. Review of Questions Unnecessary to Decision.—An appellate court will not consider matters not necessary to the disposition of the appeal.[9] Upon a determination that certain errors necessitate a reversal, other assignments of error which may not arise upon a new trial become unnecessary and will not be considered.[10] An

6. National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 131 Pac. 755.

7. See supra, § 69.

8. National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 131 Pac. 755, quoting 21 Ency. Pl. & Pr. 667.

9. Cohen v. Alameda, 168 Cal. 266, 142 Pac. 885 (in denying a rehearing); Weldon v. Rogers, 157 Cal. 410, 108 Pac. 266; Shultz v. Redondo Improvement Co., 156 Cal. 439, 105 Pac. 118; Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 17 L. R. A. (N. S.) 455, 94 Pac. 606; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; Selfridge v. Paxton, 135 Cal. 281, 67 Pac. 138; Lissak v. Crocker Estate Co., 119 Cal. 442, 51 Pac. 688; Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Tibbetts v. San Francisco, 1 Cal. Unrep. 23; Enright v. San Francisco & S. J. R. R. Co., 33 Cal. 230 (instructions given by the court will not be reviewed where the plaintiff is not entitled to recover on his own showing); Giffen v. Christ's Church, 32 Cal. App. Dec. 541, 191 Pac. 718; Carter v. Blenkiron, 31 Cal. App. Dec. 686, 189 Pac. 305; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952; Burke v. Maze, 10 Cal. App. 206–211, 101 Pac. 438, 440; Sullivan v. Lusk, 7 Cal. App. 186, 94 Pac. 91, 92. Where a judgment must be reversed and the cause sent back for new trial because of error not connected with the evidence, it is neither necessary nor proper to review the evidence and express an opinion as to its sufficiency to support the judgment. Knight v. Black, 19 Cal. App. 518, 126 Pac. 512.

10. Mercantile Trust Co. v. All Persons, 60 Cal. Dec. 103, 191 Pac. 691; Merzoian v. Kludjian, 60 Cal. Dec. 135, 191 Pac. 673; Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; McCallion v. Hibernia Sav. & Loan Soc., 83 Cal. 571, 23 Pac. 798; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; State v. Mc-

expression of opinion upon such points is not only superfluous but perhaps injudicious, as it is doubtful if such opinion would control the action of another tribunal in another case or be operative as a judgment in the appellate court itself.[11] Similar considerations apply to a decision based upon two or more grounds. When it is determined that one ground is sufficient to support the conclusion of the trial court, it is unnecessary to determine whether the other grounds are well founded or not.[12] So, also, when one sufficient finding supports the judgment, it is not necessary to consider other findings or matters as to evidence which have no relation to and cannot affect this particular uncontested finding.[13] Where uncontradicted evidence warranted a trial court in directing a verdict, errors in the admission or rejection of other evidence need not be considered.[14] And when an appeal from a judgment and from an order granting a new trial are heard together, the appeal from the judgment becomes inconsequential when the court determines that the order must be affirmed.[15]

For purpose of new trial.—By an amendment to the Code of Civil Procedure in 1880, it was enacted that

"In giving its decision, if a new trial be granted, the [appellate] court shall pass upon and determine all the

Glynn, 20 Cal. 233, 81 Am. Dec. 118; West v. Smith, 5 Cal. 96; Eddy v. American Amusement Co., 21 Cal. App. 487, 132 Pac. 83.

11. Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; State v. McGlynn, 20 Cal. 233, p. 276 (on rehearing), 81 Am. Dec. 118.

12. Shultz v. Redondo Improvement Co., 156 Cal. 439, 105 Pac. 118.

13. Heydenfeldt v. Osmont, 178 Cal. 768, 175 Pac. 1; Loustalot v. McKeel, 157 Cal. 634, 108 Pac. 707; Grant v. Dreyfus, 5 Cal. Unrep. 970, 52 Pac. 1074. See infra, § 595 et seq.

14. Blochman Commercial Bank v. Moretti, 177 Cal. 256, 170 Pac. 419.

15. Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205, explaining Bronner v. Wetzler, 55 Cal. 419; Kower v. Gluck, 33 Cal. 401. See, also, Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119, holding that where on an appeal from a judgment and from an order denying a new trial the latter order is reversed, the judgment will fall when the order

questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case."[16]

But even prior to the enactment of this provision, the courts not infrequently considered points which though unnecessary for the purposes of a decision on an appeal were deemed necessary or proper for the purposes of a new trial.[17]

Effect of consent to reversal.—While, as has been stated, a determination that certain errors necessitate a reversal renders a review of other errors immaterial, a respondent by consenting to a reversal because of certain errors, cannot deprive a defendant-appellant of the right to have an error in overruling his demurrer reviewed, where the question is involved as to whether he can be put to the labor and expense of a trial on the merits.[18]

§ 472. Review of Moot and Academic Questions.—An appellate court will not review questions which are moot and which are only of academic importance.[19] It will not

granting the new trial is final and it is unnecessary to consider the appeal therefrom.

16. Code Civ. Proc., § 53; Westerfield v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Sterne v. Mariposa Commercial & M. Co., 153 Cal. 516, 97 Pac. 66; Weisser v. Southern Pacific Ry. Co., 148 Cal. 426, 7 Ann. Cas. 636, 83 Pac. 439; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012; Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426.

17. Pierce v. Schaden, 55 Cal. 406; Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83; Taylor v. Western Pacific R. R. Co., 45 Cal. 323; Anderson v. Fisk, 36 Cal. 625; Bond v. Pacheco, 30 Cal. 530; Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Carpentier v. Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; Robles v. Clarke, 25 Cal. 317, 332; Higgins v. Houghton, 25 Cal. 252; Cahoon v. Marshall, 25 Cal. 197; Richardson v. Williamson, 24 Cal. 289; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Ringgold v. Haven, 1 Cal. 108. See infra, § 564, as to whether such decision is law of the case.

18. Brown v. Jenks, 98 Cal. 10, 32 Pac. 701.

19. Adams v. Prather, 176 Cal. 164, 167 Pac. 867; Russell v. Ross, 157 Cal. 174, 106 Pac. 583; Freman v. Marshall, 137 Cal. 159, 69 Pac. 986; Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac.

undertake to determine abstract questions of law at the request of a party who shows that no substantial right can be affected by the decision either way. It may, for example, be advantageous for municipalities, desiring to issue bonds, to obtain an opinion of the supreme court in advance attesting the validity of the proposed issue, but such relief can be obtained only in a proper proceeding in which the decision of the question sought to be presented will be necessary to the disposition of a real controversy between parties having an actual interest in the matter in litigation.[20] If all the questions involved in an appeal become moot, the appeal will be dismissed.[1] And if certain points raised upon the appeal are moot, the court will not consider them but will confine its review to the rest of the case.[2]

§ 473. Consideration of Incompetent and Excluded Evidence.—In considering the sufficiency of the evidence to sustain the verdict or decision, an appellate court will consider all proper evidence embraced in the record,[3] including incompetent evidence admitted without objection,[4] and

60; Brittan v. Oakland Bank, 112 Cal. 1, 44 Pac. 339; People v. Connolly, 22 Cal. App. 808, 134 Pac. 795; S. M. Bernard Co. v. Los Angeles, 18 Cal. App. 627, 124 Pac. 88; Wright & Kimbrough v. Carly, 11 Cal. App. 325, 104 Pac. 1009 (the construction of a trust becomes unnecessary when the life of the agreement expired by virtue of its own terms). See supra, § 13.

20. Streator v. Linscott, 153 Cal. 285, 95 Pac. 42.

1. See supra, § 13.

2. Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60.

3. Estate of Olmsted, 122 Cal. 224, 54 Pac. 745; Globe Grain & Milling Co. v. Drenth, 41 Cal. App. 604, 183 Pac. 285.

4. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 466, 168 Pac. 1036, 1037; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Estate of Olmsted, 122 Cal. 224, 54 Pac. 745 (holding that respondent's objection could not be considered); Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835; McCloud v. O'Neall, 16 Cal. 392; Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041. See Janson v. Brooks, 29 Cal. 214, applying the same rule to the trial court. And see the following cases in which the evidence, although incompetent, was, in the absence of

that improperly admitted over the respondent's objection.[5] The question of the competency of the evidence is not before the court in a case where incompetent evidence was admitted without objection. Whatever was before the jury must be regarded as proper and legitimate to be considered.[6] If evidence to prove a fact is not competent for some reason, it is the duty of the opposite party to make proper objection thereto. Failing to do so, he cannot afterwards object that the fact was not proved by the best evidence.[7] And if he does interpose an objection and it is overruled, it is the error of the court in admitting the evidence which vitiates the verdict, not the consideration thereof by the court or jury; and if the party seeking to set aside the verdict is not in a position to take advantage of this error, he cannot object that the evidence was improperly admitted.[8] The same rule applies to a review of an order granting a nonsuit.[9] The court cannot, however, consider any evidence which was excluded or stricken out by the trial court, as it is not competent for an appellate

objection, held sufficient to prove a fact: O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Prentice v. Miller, 82 Cal. 570, 23 Pac. 189; Morrell v. Morgan, 65 Cal. 575, 4 Pac. 580; Rewrick v. Gladstone, 48 Cal. 554 (where an argumentative objection was interposed); Bliss v. Ellsworth, 36 Cal. 310; St. John v. Kidd, 26 Cal. 263; Goode v. Smith, 13 Cal. 81 (where joint ownership of land was proved by oral testimony); Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041.

5. Globe Grain & Milling Co. v. Drenth, 41 Cal. App. 604, 183 Pac. 285; McCloud v. O'Neall, 16 Cal. 392.

6. Williams v. Hawley, 144 Cal. 97, 77 Pac. 792 ("Where incompetent evidence tending to prove a fact is admitted without objection, the question of its competency cannot be considered upon a specification that the evidence is insufficient to prove a fact"); Pierce v. Jackson, 21 Cal. 636; McCloud v. O'Neall, 16 Cal. 392.

7. Durkee v. Chino Land & W. Co., 151 Cal. 561, 91 Pac. 389 (the failure to object to evidence is equivalent to a concession that the evidence is competent); Curiac v. Packard, 29 Cal. 194; Tebbs v. Weatherwax, 23 Cal. 58; Goode v. Smith, 13 Cal. 81; Gille v. Anderson, 34 Cal. App. 237, 167 Pac. 193. See supra, § 82.

8. McCloud v. O'Neall, 16 Cal. 392.

9. Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336.

court to say what a finding might or should have been if certain excluded evidence had been admitted.[10]

§ 474. Matters Happening After Entry of Judgment.—Ordinarily, it is the province of an appellate court to review the judgment of inferior courts as of the time when it was rendered, as ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action.[11] If the judgment is affirmed, it is affirmed as of the date at which it was rendered.[12] If it is reversed, the case stands as if no judgment had been rendered by the inferior court.[13] It is therefore manifest that error on the part of the trial court cannot be predicated by reason of any matter occurring subsequent to the rendition of the judgment appealed from.[14] This rule is not, however, inflexible. Matters may arise subsequent to the commencement of an action which will affect the rights of the parties thereto, and the judgment to be rendered therein, and supplemental pleadings are authorized in order that these matters may be properly brought before the court. So, too, matters may arise subsequent to an appeal affecting the judgment appealed from, and although additional pleadings are not permitted in the appellate court, yet, upon proper suggestion and proof of such matters, they will be con-

10. Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; Golden Gate Mill & Min. Co. v. Joshua Hendy Mach. Co., 82 Cal. 184, 23 Pac. 45; Smith v. Sinbad Dev. Co., 11 Cal. App. 253, 104 Pac. 706.

11. First Nat. Bank v. Henderson, 101 Cal. 307, 35 Pac. 899; In re Siering, 90 Cal. 207, 27 Pac. 204.

Proceedings subsequent to a judgment not a necessary result of the matters decreed are not open to review on an appeal from the judgment itself. Wiegand v. Copeland, 14 Fed. 118, 7 Sawy. 442.

12. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

13. See infra, § 590, as to effect of reversal.

14. This rule precludes an executor, who is substituted for the appellant after his death pending appeal, from moving that the cause be remanded upon the ground that the judgment is incapable of enforcement for want of presentation as a claim against the estate; People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

sidered. A familiar illustration is where after an appeal from a judgment a new trial is granted in the superior court;[15] or, when, after appeal, it appears that from some circumstances or fact occurring thereafter, its further prosecution involves only a moot question.[16] In both cases, on proper showing necessarily outside the record, the appeal will be dismissed. So, too, an appeal will be dismissed when it is shown that the judgment appealed from has been satisfied,[17] or that judgment was rendered upon a cause of action which did not survive, and the cause of action has abated, pending appeal, by the death of the appellant.[18] The same result follows the repeal, pending appeal, of the statute upon which the jurisdiction of an appellate court to entertain the appeal is based, or upon which the judgment in a penal action depends.[19] Upon the same principle an appellate court will consider the disposition, pending an appeal, of another appeal in another action intimately connected with the appeal before the court, when brought before the court and supported by evidence.[20]

§ 475. Review on Appeal from Part of Judgment.— Upon an appeal from a part of a judgment or order not so intimately connected with the remainder that a reversal of the part appealed from requires a consideration of the whole case in the court below, an appellate court can review only the portion appealed from.[1] The unaf-

15. See infra, § 438.
16. See supra, § 437.
17. See supra, § 437.
18. See supra, § 433.
19. Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 Pac. 704. See supra, § 434.
20. Sewell v. Johnson, 165 Cal. 762, Ann. Cas. 1915B, 645, 134 Pac. 704, overruling Sewell v. Price, 164 Cal. 265, 128 Pac. 407. See supra, § 461.

1. G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 Pac. 1025; Whalen v. Smith, 163 Cal. 360, 125 Pac. 904; In re Burdick, 112 Cal. 387, 44 Pac. 734 (for opinion in department, see 5 Cal. Unrep. 6, 40 Pac. 35); Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 225, 39 Pac. 758.

One appealing from a portion of a judgment cannot take advantage of errors in the portion not ap-

fected parts of the judgment or order must be deemed final, and can be enforced pending the appeal.[2] But where the part of the judgment appealed from is so interwoven and connected with the remainder, or so dependent thereon that the appeal from a part affects the other parts or involves a consideration of the whole, and is really an appeal from the whole, it seems that the appellate court may and should have power to extend its reversal to the entire judgment when necessary to accomplish justice,[3] although obviously it cannot do so when the rights of parties not served with notice of appeal will be injuriously affected.[4]

Grounds of Decision Below.

§ 476. In General.—When an order granting relief is general in its terms, the appellate court will examine the entire record upon which the order is based, and affirm it, if it finds therein any ground upon which the order is justified. In other words, the order will be affirmed if it can be sustained upon any of the assigned grounds,[5] for it will be presumed that the order was made upon that ground.[6] This rule has been applied to orders sustaining demurrers,[7] orders striking out pleadings,[8] orders granting nonsuits,[9] and orders granting new trials.[10]

pealed from. Byrne v. Hudson, 127 Cal. 254, 59 Pac. 597.

2. Estate of Horman, 167 Cal. 473, 140 Pac. 11; Whalen v. Smith, 163 Cal. 360, 125 Pac. 904.

3. Whalen v. Smith, 163 Cal. 360, 125 Pac. 904, per Shaw, J. (Henshaw, J., dissenting).

4. Miller v. Thomas, 73 Cal. 437, 15 Pac. 53.

5. Billesbach v. Larkey, 161 Cal. 649, 120 Pac. 31; De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152; Wright v. Yosemite Transp. Co., 28 Cal. App. 279, 152 Pac. 54.

6. See infra, § 503.

7. Billesbach v. Larkey, 161 Cal. 649, 120 Pac. 31; People v. Central Pacific R. R. Co., 76 Cal. 29, 18 Pac. 90; MacMullan v. Kelly, 19 Cal. App. 701, 127 Pac. 819.

8. Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370.

9. Ford v. Weed Lumber Co., 25 Cal. App. 702, 147 Pac. 112.

10. Scott v. Times-Mirror Co., 178 Cal. 688, 174 Pac. 312; Rahmel v. Rost, 178 Cal. 15, 171 Pac. 1068; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 463, 168 Pac.

Where reasons for order are given.—While it is true that an appellate court will not review matters not considered by the court below, and that an appellant cannot on appeal urge matters not presented in the court below,[11] it is equally true that the court will not review the reasons which the trial court gave for its judgment or order, and will not reverse an order or judgment merely because given for a wrong or insufficient reason. If the judgment or order in question is right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.[12] It was said by Mr. Justice Temple in an

1037; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86; Wurzburger v. Nellis, 165 Cal. 48, 130 Pac. 1052, 8 N. C. C. A. 133; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761; Swett v. Gray, 141 Cal. 63, 74 Pac. 439; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Tibbetts Bros. & Cross v. Bower, 121 Cal. 7, 53 Pac. 359; In re Martin, 113 Cal. 479, 45 Pac. 813; Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; Minturn v. Bliss, 77 Cal. 90, 19 Pac. 185; Oullahan v. Starbuck, 21 Cal. 413; Clarkin v. Lewis, 20 Cal. 634; Weddle v. Stark, 10 Cal. 301; Warner v. F. Thomas P. Dyeing & Cleaning Wks., 4 Cal. Unrep. 680, 37 Pac. 153 (for subsequent opinion, see 105 Cal. 409, 38 Pac. 960); Austin v. Gagan, 3 Cal. Unrep. 533, 30 Pac. 790; Ham v. County of Los Angeles, 31 Cal. App. Dec. 496 (59 Cal. Dec. 474, denying hearing in the supreme court), 189 Pac. 462; American Marine Paint Co. v. Nyno Line, 30 Cal. App. Dec. 861, 187 Pac. 71; Whitney v. Northwestern Pacific R. R. Co., 39 Cal. App. 139, 178 Pac. 326; Pacific Gas & Electric Co. v. Rollins, 32 Cal. App. 782, 164 Pac. 53; Shea-Bocqueraz Co. v. Hartman, 20 Cal. App. 534, 129 Pac. 807; Hughes Bros. v. Rawhide Gold Min. Co., 16 Cal. App. 293, 116 Pac. 969; Eidinger v. Sigwart, 13 Cal. App. 667, 110 Pac. 521; Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787; Hubbell Oil Co. v. Morrison, 7 Cal. App. 457, 94 Pac. 589; Lynch v. McGhan, 7 Cal. App. 132, 93 Pac. 1044; Commercial Nat. Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. 750.

11. See supra, §§ 65–93 inclusive.

12. Miller & Lux v. Kern Co. Land Co., 140 Cal. 132, 73 Pac. 836; Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738; Davey v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117; McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466; Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021; Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; Estate of Kingsley, 93 Cal. 576, 29 Pac. 244; Miller v.

early case, in respect to the rule that the appellate court will review the rulings and decisions of the trial court, rather than the reasons given for such rulings: "The fact that the statute requires the judge to state in writing the grounds upon which the motion was granted or denied does not make it incumbent upon the prevailing party to defend the logic of the judge. It is enough if the decision be correct."[13] In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review. If the former be correct, the appellate court is not concerned with the faults of the latter.[14] Moreover, any opinion of the court below is not a part of the record, and cannot be looked to by an appellant for the purpose of predicating error in the ruling of the trial court.[15] Of course, this rule does not prevent the citation of the opinion of the trial court in argument to assist the appellate court in reaching a correct solution of the questions submitted, there being no attempt in such

Wade, 87 Cal. 410, 25 Pac. 487; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Quinn v. Quinn, 81 Cal. 14, 22 Pac. 264; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Low v. Warden, 77 Cal. 94, 19 Pac. 235; Chabot v. Tucker, 39 Cal. 434; Kidd v. Teeple, 22 Cal. 255; Helm v. Dumars, 3 Cal. 454; Guaranty Realty Co. v. Recreation Gun Club, 12 Cal. App. 383, 107 Pac. 625; County of Los Angeles v. Winans, 13 Cal. App. 257, 109 Pac. 650; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344. See supra, § 419, as to effect of the failure of respondent in his brief to urge grounds for sustaining ruling.

13. Chabot v. Tucker, 39 Cal. 434. And again by the same learned judge, it was said in a later case: "With the process of reasoning by which the court reached its conclusion we have nothing to do. That may have been erroneous and the ruling correct. To justify a reversal, it is incumbent upon the appellant to show an erroneous ruling, and not merely bad reasoning or mistaken views of the law." Estate of Kingsley, 93 Cal. 576, 29 Pac. 244. See supra, § 235.

14. Davey v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117; County of Los Angeles v. Winans, 13 Cal. App. 257, 109 Pac. 650.

15. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307; Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738; Estate of Kingsley, 93 Cal. 576, 29 Pac. 244.

case to hold the action of the trial court erroneous because of mistaken reasons therefor.[16]

§ 477. **Application of Rule Generally.**—If a complaint is insufficient upon any ground properly specified in a demurrer thereto, an order sustaining the demurrer to a defective complaint will be upheld, even though the particular ground upon which the court sustained it may be untenable.[17] A contrary holding might deprive a party defendant of a right to be heard upon any or all the grounds of his demurrer because the trial court designates one as a ground for its order.[18] Furthermore, the code contemplates a general order alone. Any matter inserted in the order other than the decision for or against the demurrer is surplusage, and not to be regarded. The question always is: Ought the demurrer to have been sustained?[19] A ruling on demurrer will not be sustained, however, upon a ground not specified in the demurrer.[20] This rule has been applied also to orders dissolving attachments,[1] to orders granting nonsuits,[2] and to orders

16. Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344. See infra, § 478, as to opinion where the court rules on a motion for new trial.

17. Neale v. Morrow, 163 Cal. 445, 125 Pac. 1052; Billesbach v. Larkey, 161 Cal. 649, 120 Pac. 649, 120 Pac. 31; Burke v. Maguire, 154 Cal. 456, 98 Pac. 21; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. 261; Wilson v. Carter, 117 Cal. 53, 48 Pac. 983; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; People v. Central Pacific R. Co., 76 Cal. 29, 18 Pac. 90; Mathews v. Mathews, 33 Cal. App. Dec. 299, 193 Pac. 586; Koch v. Speedwell Motor Car Co., 24 Cal. App. 123, 140 Pac. 598, 600; Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091.

18. Koch v. Speedwell Motor Car Co., 24 Cal. App. 123, 140 Pac. 598, 600.

19. People v. Central Pacific R. R. Co., 76 Cal. 29, 18 Pac. 90.

20. Morgan v. Asher, 33 Cal. App. Dec. 45, 86, 60 Cal. Dec. 529, 193 Pac. 288 (by supreme court in denying a hearing; holding this to be the rule although the complaint is demurrable on another ground not specified).

1. Willett v. Alpert, 181 Cal. 652, 185 Pac. 976.

2. Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 Pac. 168 (an order granting a nonsuit will be upheld if sustainable upon any of the grounds assigned in the mo-

refusing to give instructions.[3] It seems, however, that this principle is not applicable when the trial court does not grant a motion upon a ground specified therein, but upon an independent ground.[4]

Evidence.—A ruling in excluding evidence will be sustained regardless of the ground of objection stated by counsel, if the true objection could not be obviated on being stated. If the court decides correctly in rejecting testimony, it is not important whether the best objection was made or whether any objection was made. An objection to evidence is but a reason offered for its exclusion. The objection may be untenable or insufficient; yet, if sustained, and there appears any other reason for which the evidence should have been excluded, the ruling must stand.[5] So, too, where the court admits evidence, its rul-

tion); Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518 (holding order will be sustained on any ground, whether made a ground of the motion or not). See supra, § 88.

3. Low v. Warden, 77 Cal. 94, 19 Pac. 235 (sustaining an order refusing to give an instruction made upon an erroneous ground where it appeared that the instruction was erroneous); People v. Sears, 18 Cal. 635 (a criminal case).

4. In Mathews v. Mathews, 33 Cal. App. Dec. 299, 193 Pac. 586, a provision in an interlocutory decree of divorce as to alimony was not carried into the final decree. The defendant moved to vacate this provision in the interlocutory decree upon the ground that the final decree did not contain any direction as to the payment of alimony and because of the changed financial situation of the parties. "The court did not grant such motion, but made an order which shows by its very terms that it was based upon the proposition that a provision for the payment of alimony in an interlocutory judgment of divorce cannot be enforced unless it is carried into the final decree. Such is not the law"; and the principle that the appellate court will sustain the action of the trial court upon any ground specified in the notice of motion is inapplicable.

5. Davey v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117. See supra, §§ 85, 86. Unlike orders sustaining demurrers, or granting nonsuits or new trials, an order excluding evidence will be upheld if sustainable upon any ground, though not stated by counsel in his objection. This distinction is undoubtedly due to the fact that the trial court may exclude evidence on its own motion.

ing, if correct, will be upheld though based on an erroneous ground.[6]

§ 478. Application to Order Granting New Trial.—This rule finds frequent application to orders granting motions for new trial. The appellate court is not confined to a consideration of the point upon which a new trial was granted, but will affirm the order if upon the whole record it appears that a new trial should be had.[7] A contrary

6. Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679.

7. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 Pac. 1037; Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 165 Pac. 12; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483; Steil v. Sun Ins. Office, 171 Cal. 795, 155 Pac. 72; Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 Pac. 712; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029; Brett v. S. H. Frank & Co., 153 Cal. 267, 94 Pac. 1051; Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 5 L. R. A. (N. S.) 1059, 85 Pac. 152; Weisser v. Southern Pacific Ry. Co., 148 Cal. 426, 7 Ann. Cas. 636, 83 Pac. 439; Thompson v. California Construction Co., 148 Cal. 35, 82 Pac. 367; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Miller & Lux v. Enterprise Canal & Land Co., 145 Cal. 652, 79 Pac. 439; Simon Newman Co. v. Lassing, 141 Cal. 175, 74 Pac. 761; Swett v. Gray, 141 Cal. 63, 74 Pac. 439; Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449; Dundon v. McDonald, 137 Cal. 1, 69 Pac. 498; People v. Castro, 133 Cal. 11, 65 Pac. 13 (a criminal case); Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Sherwood v. Kyle, 125 Cal. 652, 58 Pac. 270 (the respondent may defend the ruling upon any point involved in his motion); Noyes v. Wood, 102 Cal. 389, 36 Pac. 766; Mills v. Oregon Ry. & Nav. Co., 102 Cal. 357, 36 Pac. 772; Shanklen v. Hall, 100 Cal. 26, 34 Pac. 636; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Harnett v. Central Pacific R. R. Co., 78 Cal. 31, 20 Pac. 154; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418 (the order should be affirmed if it can be justified on any of the grounds upon which the motion was based); McCarthy v. Loupe, 62 Cal. 299; Chabot v. Tucker, 39 Cal. 434; Coghill v. Marks, 29 Cal. 673, per Shafter, J.; Grant v. Moore, 29 Cal. 644; Bolton v. Stewart, 29 Cal. 615; Mathews v. Mathews, 33 Cal. App. Dec. 299, 193 Pac. 586; Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 178; Whitney v. Northwestern Pacific R. R. Co., 39 Cal. App. 139, 178 Pac. 326; Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007; Briggs v. Hall, 20 Cal. App. 372, 129 Pac. 288; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806;

rule might work great injustice. The moving party whose motion has prevailed is not "aggrieved," and has no ground for an appeal. If the appellate court should be limited to a review of merely the ground designated by the lower court, and that ground should be held insufficient, the moving party would be deprived of the new trial to which the record might show that he is manifestly entitled.[8] Moreover, if the trial judge prepares a written opinion, such opinion though printed in the transcript, is not part of the record on appeal, and cannot be considered for any purpose, or at least it cannot limit the appellate court's review of the grounds specified in the motion.[9] The ground upon which the order is sustained must, of course, be properly specified in the notice of intention to

Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Boca & Loyalton R. R. Co. v. Sierra Valleys R. R. Co., 2 Cal. App. 546, 84 Pac. 298 ("The general rule is that if there be any grounds upon which the order of the court can be upheld, the order will be sustained, irrespective of the particular ground given by the court, whether in an opinion or by a statement in the order itself"); Martin v. Markarian & Co., 1 Cal. App. 687, 82 Pac. 1072; Houghton v. Market St. Ry. Co., 1 Cal. App. 576, 82 Pac. 972; Baldwin v. Napa & Sonoma Wine Co., 1 Cal. App. 215, 81 Pac. 1037 (the court will examine the entire record upon which the order is based, and affirm the order if there be found in the record any error which would have justified the court in making it). But see Kinney v. King, 32 Cal. App. Dec. 161, 190 Pac. 834, holding where the court on its order expressly stated that it granted the motion solely on the ground that the plaintiff was not entitled to recover, other errors occurring at the trial would not be considered. See supra, § 476, as to rule where order is general in terms; and supra, § 418 et seq., as to effect of failure of respondent in his brief to urge other grounds than that named in the order.

8. Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481, per Harrison, J.

9. Wurzburger v. Nellis, 165 Cal. 48, 130 Pac. 1052; Classen v. Thomas, 164 Cal. 196, 128 Pac. 329; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Ben Lomond Wine Co. v. Sladky, 7 Cal. Unrep. 110, 71 Pac. 178; opinion in bank, 141 Cal. 619, 75 Pac. 332; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761; Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449 (while the opinion of the lower court may not operate to limit the power of the appellate court in considering the grounds upon which a new trial was granted, it may, nevertheless, be examined, together with the statement, for the purpose of ascertaining whether it

move for new trial,[10] as the appellate court cannot go outside of the grounds specified in the motion.[11] But if none of the grounds specified warrant the granting of a new trial, the order will be reversed.[12]

Prior to 1915, when the trial court was authorized to grant a new trial on its own motion, its order granting a new trial would be upheld if sustainable upon any ground allowed under the code.[13]

§ 479. **Exception to Rule.**—Prior to 1919 it was frequently held that an order granting a new trial would be presumed to have been based upon the ground that the evidence was insufficient to justify the verdict or decision, if this ground was assigned in the notice of intention and specified in the bill of exceptions or statement,[14] and the order did not exclude this as a ground upon which it was made.[15] But this presumption was not indulged where there was a conflict in the evidence and the order excluded this as a ground of its action by direct language in the order itself.[16]

discloses any special point in the case which in disposing of the appeal may merit particular attention in view of the new trial in the lower court); Newman v. Overland Pacific Ry. Co., 132 Cal. 73, 64 Pac. 110; Harnett v. Central Pacific R. R. Co., 78 Cal. 31, 20 Pac. 154; De Vall v. Perrin, 34 Cal. App. 676, 168 Pac. 584; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Boca v. Loyalton R. R. Co. v. Sierra Valleys R. Co., 2 Cal. App. 546, 84 Pac. 298. See supra, § 235.

10. Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 165 Pac. 12. See supra, § 93.

11. Chambers v. Farnham, 39 Cal. App. 17, 179 Pac. 423.

12. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Cheney v. McGarvin, 7 Cal. App. 71, 93 Pac. 386.

13. Townley v. Adams, 118 Cal. 382, 50 Pac. 550; Occidental Real Estate Co. v. Gantner & Mattern, 7 Cal. App. 727, 95 Pac. 1042. See Code Civ. Proc., § 657; and see NEW TRIAL.

14. See supra, § 407.

15. See infra, § 524.

16. Steil v. Sun Ins. Office, 171 Cal. 795, 155 Pac. 72; Fritz v. Mills, 170 Cal. 449, 150 Pac. 375; Frost v. Los Angeles Ry. Co., 165 Cal. 365, 132 Pac. 442; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; Higgins v. Los Angeles Gas & Elec. Co., 159 Cal. 651, 34 L. R. A. (N. S.) 717, 115 Pac. 313 (where the trial court denies the motion on all grounds save one, and grants

As indicated above, this rule was changed in 1919 by an amendment to section 657 of the Code of Civil Procedure providing that when a new trial is granted on the ground of insufficiency of the evidence to sustain a verdict, the order should so specify; otherwise it will be presumed that the order was not based on that ground.[17]

Review on Appeal from Final Judgment.

§ 480. In General.—Section 956 of the Code of Civil Procedure provides as follows:

"Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to

it on the sole ground of misconduct of the jury, the question of the sufficiency of the evidence to sustain the verdict is eliminated from the consideration of the appellate court); Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029; Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507; Weisser v. Southern Pacific Ry. Co., 148 Cal. 426, 7 Ann. Cas. 636, 83 Pac. 439; Thompson v. California Construction Co., 148 Cal. 35, 82 Pac. 367; Siemsen v. Oakland S. L. & H. Elec. Ry. Co., 134 Cal. 494, 66 Pac. 672; Newman v. Overland Pacific Ry. Co., 132 Cal. 73, 64 Pac. 110; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 Pac. 178; Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007 (an order granting a new trial "on the sole ground that the damages awarded to the plaintiff . . . are excessive" neither expressly nor impliedly excludes the insufficiency of the evidence as one of the grounds for its making); Briggs v. Hall, 24 Cal. App. 586, 141 Pac. 1067, explaining 20 Cal. App. 372, 129 Pac. 288; Boca v. Loyalton R. R. Co. v. Sierra Valley R. R. Co., 2 Cal. App. 546, 84 Pac. 298.

17. Marr v. Whistler, 33 Cal. App. Dec. 229, 193 Pac. 600 (holding that where a motion for new trial is made upon the ground of insufficiency of evidence among others, and the order states that a new trial was granted upon all the grounds set forth, there was such a substantial compliance with the statute as to authorize the appellate court in concluding that this was one of the grounds for the order).

review any decision or order from which an appeal might have been taken."

Upon an appeal from a final judgment, an appellate court may review errors affecting the judgment appearing on the face of the judgment-roll,[18] and all objections and exceptions affecting the judgment shown by a proper bill of exceptions or reporter's transcript,[19] but not errors in rulings and orders made subsequent to the judgment.[20]

Default judgment.—As a default judgment is a final appealable judgment, it follows that all errors disclosed by the record can be reviewed and corrected on an appeal from such a judgment as well as on a judgment after issue joined.[1] On an appeal from such judgment, the appellant may have reviewed the question whether or not a default was properly entered,[2] and whether or not a motion to vacate an entry of default was properly granted or denied,[3] and whether the complaint states facts sufficient to constitute a cause of action.[4]

§ 481. Pleadings, Verdict, Findings and Judgment— *Pleadings.*—An appellate court, upon an appeal from the judgment, may review the question whether the judgment is supported by the pleadings, and whether the com-

18. Thompson v. Patterson, 54 Cal. 542.

19. Errors in the rulings of the court below in the progress of the trial affecting the judgment may be reviewed if there is in the record a proper bill of exceptions or reporter's transcript. Vore v. Ephraim, 173 Cal. 245, 159 Pac. 719; Thompson v. Patterson, 54 Cal. 542; Carpentier v. Williamson, 25 Cal. 154; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297.

20. See infra, § 485.

1. Hallock v. Jaudin, 34 Cal. 167. See McDonald v. Swett, 76 Cal. 257, 18 Pac. 324, and Savings & Loan Society v. Meeks, 66 Cal. 371, 5 Pac. 624, holding under the former practice that, if the appeal is not taken within sixty days, nothing is reviewable save what appears on the judgment-roll.

2. Maud v. Wear, 55 Cal. 25 (whether there was error in entering a default before the expiration of the time to answer may be reviewed); Ricketson v. Torres, 23 Cal. 636.

3. Savage v. Smith, 154 Cal. 325, 97 Pac. 821; Gibson v. Superior Court, 83 Cal. 643, 24 Pac. 152.

4. Martin v. Lawrence, 156 Cal. 191, 103 Pac. 913.

plaint upon which the judgment is based states facts sufficient to constitute a cause of action.[5]

Verdict and findings.—Upon an appeal from a judgment the court may review "the verdict or decision."[6] As the word "decision" referred to in section 648 of the Code of Civil Procedure has been held to be the statement of facts found and conclusions of law therefrom mentioned in section 633 of the same code,[7] the same meaning must be accorded to the word "decision" occurring in section 956 of the code.[8] Upon appeal from a judgment, the court may review the question whether certain findings are outside of the issues,[9] or are consistent with the pleadings,[10] whether the court failed to find upon a material issue,[11] whether the decision is supported by the admissions in the pleadings,[12] and whether the conclusions of law are cor-

5. Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794; Van Buskirk v. Kuhns, 164 Cal. 472, Ann. Cas. 1914B, 932, 44 L. R. A. (N. S.) 710, 129 Pac. 587; Martin v. Lawrence, 156 Cal. 191, 103 Pac. 913; Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Holt v. Holt, 131 Cal. 610, 63 Pac. 912 (an interlocutory decree of partition must be regarded as a final judgment within the rule, and the sufficiency of the complaint is reviewable on appeal therefrom, but not on appeal from an order confirming the sale); Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Evans v. Paige, 102 Cal. 132, 36 Pac. 406; Spanagel v. Dellinger, 38 Cal. 278; Putnam v. Lamphier, 36 Cal. 151; Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801; Blodgett v. Scott, 11 Cal. App. 310, 104 Pac. 842, by supreme court in denying a rehearing; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 301, 90 Pac. 203. See infra, § 488, as to review of this question upon appeal from an order on new trial.

6. Code Civ. Proc., § 956.

7. See supra, § 411.

8. The word "decision" evidently means something different from the phrase "any intermediate order or decision," for certainly the latter phrase does not refer to the written findings of fact and conclusions of law filed with the clerk as a result of the trial on the merits. Clifford v. Allman, 84 Cal. 528, 24 Pac. 292.

9. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124.

10. Moore v. Douglas, 132 Cal. 399, 64 Pac. 705.

11. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297; Williams v. Pratt, 10 Cal. App. 625, 103 Pac. 151. See infra, § 489, as to review of this question upon appeal from order on new trial.

12. Estate of Doyle, 73 Cal. 564, 15 Pac. 125 (holding that when the

rectly drawn from the findings of fact.[13] It may also review an order of a trial court amending the findings.[14]

Judgment.—Upon an appeal from a judgment, the court may review the following questions: Whether the judgment is supported by the verdict or findings, or is in conflict therewith,[15] whether the judgment is authorized by the pleadings,[16] whether there is a fatal variance between the case made out by the pleadings and that made by the findings and judgment,[17] whether the court erred in allowing interest on the judgment.[18]

decision of the court in admitting a will to probate is not supported by the facts admitted in the pleadings, the remedy of the contestant is to appeal from the order).

13. Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794; Mentone Irr. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082; Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861; Thompson v. Hancock, 51 Cal. 110; Keller v. Cliver, 34 Cal. App. 390, 167 Pac. 551; Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306 (when the conclusion of the court is unsupported by the facts found, the remedy is by appeal from the judgment). See infra, § 487. See infra, § 490, as to review of conclusions of law on appeal from order under Code Civ. Proc., § 663.

14. Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975.

15. Rossi v. Caire, 174 Cal. 74, 161 Pac. 1161; Van Buskirk v. Kuhns, 164 Cal. 472, Ann. Cas. 1914B, 932, 44 L. R. A. (N. S.) 710, 129 Pac. 587; Fagan v. Lentz, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951; Ivancovich v. Weilenman, 144 Cal. 757, 78 Pac. 268; Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Swift v. Occidental Min. etc. Co., 141 Cal. 161, 74 Pac. 700; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Rush v. Casey, 39 Cal. 339; Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; Larue v. Chase, 1 Cal. Unrep. 613; Potter v. Pigg, 35 Cal. App. 707, 170 Pac. 1066; First Nat. Bank v. Trognitz, 14 Cal. App. 176, 111 Pac. 402.

Whether the judgment is broader than the facts found is reviewable upon appeal from the judgment. Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Shepard v. McNeil, 38 Cal. 72; Hayford v. Wallace, 5 Cal. Unrep. 489, 46 Pac. 301.

16. See supra, note 5, this section.

17. Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Fernandez v. Western Fuse & Explosives Co., 34 Cal. App. 420, 167 Pac. 900.

18. Durfee v. Seale, 139 Cal. 603, 73 Pac. 435 (but the question can-

§ 482. **Evidence.**—While rulings as to admissibility of evidence are not reviewable upon an appeal on the judgment-roll alone,[19] if the evidence is brought up in the record in some proper manner, an appellate court may, upon an appeal from a judgment, review alleged errors in the admission of evidence,[20] alleged errors in excluding evidence,[1] a ruling refusing to strike out testimony,[2] and questions as to variance.[3]

Sufficiency of evidence.—While, under the Practice Act, the appellate court could not on an appeal from a judgment review the evidence, or pass upon the question as to its sufficiency to support the findings or verdict,[4] it is well settled under the code that the sufficiency of the evidence to sustain the verdict or decision is reviewable upon an appeal from the final judgment in an action,[5] whether the appeal be taken by the regular or by the alternative method,[6] provided the evidence is brought up in the

not be reviewed on appeal from an order denying a new trial).

19. Archer v. Harvey, 164 Cal. 274, 128 Pac. 410.

20. Story v. Green, 164 Cal. 768, Ann. Cas. 1914B, 961, 130 Pac. 870, where evidence as to pecuniary condition of defendant in a negligence suit was introduced; McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243; Walls v. Preston, 25 Cal. 59.

1. Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858.

2. Leavens v. Pinkham etc., 164 Cal. 242, 128 Pac. 399.

3. Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Putnam v. Lamphier, 36 Cal. 151.

4. City of Stockton v. Creanor, 45 Cal. 247; Rycraft v. Rycraft, 42 Cal. 444; Hihn v. Peck, 30 Cal. 280; People v. Banvard, 27 Cal. 470; Burnett v. Pacheco, 27 Cal. 408; Green v. Butler, 26 Cal. 595; Whitman v. Sutter, 3 Cal. 179; Hibberd v. Smith, 1 Cal. Unrep. 554; People v. Parrott, 1 Cal. Unrep. 412. Notwithstanding this rule, the court could determine whether a judgment was authorized by an agreed statement of facts which formed part of the judgment-roll. Reed v. Bernal, 40 Cal. 628.

5. Vore v. Ephraim, 173 Cal. 245, 159 Pac. 719; Ford v. Freeman, 40 Cal. App. 221, 180 Pac. 545.

6. Fisher v. Oliver, 174 Cal. 781, 164 Pac. 800; Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981; Fraser v. Sheldon, 164 Cal. 165, 128 Pac. 33. See Code Civ. Proc., § 941c. Prior to 1915, the sufficiency of the evidence might be reviewed on an appeal taken by the alternative method within sixty days after notice of entry of judgment, or in the absence thereof, within six

record in some proper manner,[7] and this exception is properly specified in the bill of exceptions.[8] The power to consider the evidence on such appeal is given by section 956 of the Code of Civil Procedure,[9] and was not dependent upon section 939 of the same code as it existed prior to 1915, which, after permitting the taking of appeals within six months after entry, provided: "But an exception to the decision or verdict on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the entry of the judgment."[10] Inasmuch, however, as

months after entry thereof. Magee v. Magee, 174 Cal. 276, 162 Pac. 1023 ("As the record does not show that any notice of such entry [of judgment] had been served upon the appellant, the appeal [taken within six months after entry] was within the time prescribed by section 941b of the Code of Civil Procedure, and any question, including that of the sufficiency of the evidence to support the findings, may be reviewed"); Blair v. Brownstone Oil & Ref. Co., 168 Cal. 632, 143 Pac. 1022; Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294; Healy v. Obear, 29 Cal. App. 696, 157 Pac. 569, 570; Lewis-Simas-Jones Co. v. C. Kee & Co., 27 Cal. App. 135, 148 Pac. 973; Rossi v. Beaulieu Vineyard, 20 Cal. App. 770, 130 Pac. 201; Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460, 120 Pac. 44; Brown v. Coffee, 17 Cal. App. 381, 121 Pac. 309, 311; Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340; Russell v. Banks, 11 Cal. App. 450, 105 Pac. 261.

7. Archer v. Harvey, 164 Cal. 274, 128 Pac. 410; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Rankin v. Newman, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304; Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811; Ornbaum v. His Creditors, 61 Cal. 455; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370.

8. See supra, § 407.

9. Smith v. Lightston, 59 Cal. Dec. 68, 186 Pac. 769.

10. The following cases were decided under this statute: Vore v. Ephraim, 173 Cal. 245, 159 Pac. 719; Dennis v. Gordon, 163 Cal. 427, 125 Pac. 1063; In re College Hill Land Assn., 157 Cal. 596, 108 Pac. 681.

Prior to 1907 this statute limited the time to sixty days after "rendition" of the judgment. Boin v. Spreckels Sugar Co., 155 Cal. 612, 102 Pac. 937; Long v. Cramer Meat & Pack. Co., 155 Cal. 402, 101 Pac. 297; Rickey Land & Cattle Co. v. Glader, 153 Cal. 179, 94 Pac. 768 (limitation where appeal is from a judgment of dismissal without findings of fact); Crandall v. Parks, 152 Cal. 772, 93 Pac. 1018; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184 (statute inapplicable to bill of exceptions to order refusing to allow amendments); Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243;

the power to review the sufficiency of the evidence was conferred by section 956, the power was not affected by the amendment to section 939 omitting the quoted clause.

Dodge v. Carter, 140 Cal. 663, 74 Pac. 292; Sather Banking Co. v. Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352; Gilbert v. Kelly, 138 Cal. 689, 72 Pac. 344; McDonald v. Hayes, 132 Cal. 490, 64 Pac. 850 (rule does not apply to review of errors in admission of evidence); Ryland v. Heney, 130 Cal. 426, 62 Pac. 616; Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940; Wise v. Ballou, 129 Cal. 45, 61 Pac. 574; Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Reed v. Johnson, 127 Cal. 538, 59 Pac. 986; McHugh v. Adkins, 117 Cal. 228, 49 Pac. 2; California Imp. Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018; Packard v. Craig, 114 Cal. 95, 45 Pac. 1033 (an appeal from a judgment in an election contest is subject to this rule); Painter v. Painter, 113 Cal. 371, 45 Pac. 689 (when judgment is "rendered"); Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225; Brooks v. San Francisco & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570; Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386; Secord v. Quigley, 106 Cal. 149, 39 Pac. 623; Estate of Heldt, 98 Cal. 553, 33 Pac. 549 (order appointing administrator); Scott v. Glenn, 98 Cal. 168, 32 Pac. 983; Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444 (rule does not preclude review of order granting or denying nonsuit); Curran v. Kennedy, 89 Cal. 98, 26 Pac. 641; Clifford v. Allman, 84 Cal. 528, 24 Pac. 292 (defining "decision"); Tillman v. Averett, 82 Cal. 576, 23 Pac. 875; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546; McGrath v. Hyde, 81 Cal. 38, 22 Pac. 293; Estate of Rose, 80 Cal. 166, 22 Pac. 86; Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; Thompson v. White, 76 Cal. 381, 18 Pac. 399; McDonald v. Sweet, 76 Cal. 257, 18 Pac. 324; Mogk v. Peterson, 75 Cal. 496, 17 Pac. 446; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; Estate of Crowey, 71 Cal. 300, 12 Pac. 230 (appeal from judgment confirming report of appraisers setting apart a homestead out of a decedent's estate); Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510; Savings & Loan Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624; Handley v. Figg, 58 Cal. 578; Clark v. Gridley, 49 Cal. 105; Lower v. Knox, 10 Cal. 480; People v. Jones, 7 Cal. Unrep. 64, 70 Pac. 1063; Steen v. Hendy, 4 Cal. Unrep. 916, 38 Pac. 718; People v. Jones, 7 Cal. Unrep. 64, 70 Pac. 1063; Rhoads v. Gray, 5 Cal. Unrep. 664, 48 Pac. 971; Nelmes v. Wilson, 4 Cal. Unrep. 267, 34 Pac. 341; Layne v. Johnson, 19 Cal. App. 95, 124 Pac. 860; National Bank v. Mulford, 17 Cal. App. 551, 120 Pac. 446; Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460, 120 Pac. 44; Carver v. San Joaquin Cigar Co., 16 Cal. App. 761, 118 Pac. 92; Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560; First Nat. Bank v. Trognitz, 14 Cal. App. 176, 111 Pac. 402; Andrews v. Wheeler, 10 Cal. App. 614, 103 Pac. 144; Los Angeles Brewing Co. v. Klinge, 7 Cal. App. 550, 95 Pac. 44; California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507, 92 Pac.

When the time to appeal was reduced to sixty days, there was no further reason for this limitation and it was properly omitted.[11]

§ 483. Interlocutory Orders.—Section 956 of the Code of Civil Procedure specifically authorizes a court upon appeal from a final judgment to review nonappealable interlocutory or intermediate orders involving the merits or necessarily affecting the judgment, or substantially affecting the rights of a party.[12] To be reviewable, the interlocutory order must involve the merits or necessarily affect the judgment,[13] and it must not be directly appealable.[14] An order refusing to dismiss an action is not itself appealable, but the decision on the motion is not

509; Estate of Dellow, 1 Cal. App. 529, 82 Pac. 558.

This statute did not prevent a review, upon an appeal not taken within sixty days, of rulings on the admission of evidence (McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243), or of a ruling upon a motion for nonsuit. Warner v. Darrow, 91 Cal. 309, 27 Pac. 737. Compare Miller v. Wade, 87 Cal. 410, 25 Pac. 487, in which the opinion of Mr. Justice Works to the contrary was not concurred in by a majority of the court.

11. Smith v. Lightston, 59 Cal. Dec. 68, 186 Pac. 769.

12. Free Gold Min. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61 (order authorizing receiver to purchase a tailings plant to work a large quantity of tailings of great value); Illinois Trust & Savings Bank v. Pacific R. Co., 99 Cal. 407, 33 Pac. 1132 (order allowing receiver's account); Tripp v. Santa Rosa St. R. R. Co., 69 Cal. 631, 11 Pac. 219 (an order denying a motion to set aside an order refusing the transfer of a cause to the federal courts); Thompson v. White, 63 Cal. 505; Gates v. Salmon, 28 Cal. 320 (interlocutory judgment in a partition suit).

13. See infra, note 15, this section, and infra, § 484.

14. Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48 (citing code section); Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (judgment in divorce suit directing payment of alimony); In re French Bank Case, 53 Cal. 495 (decided before the amendment of the code authorizing an appeal from an order appointing a receiver); McCourtney v. Fortune, 42 Cal. 387; Boos v. Byrnes, 33 Cal. App. 755, 166 Pac. 596 (order denying motion to set aside judgment); Hughes v. Chung Sun Tung Co., 28 Cal. App. 371, 154 Pac. 299, 301 (an order vacating a nonsuit is not reviewable); Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81.

reviewable on appeal from a judgment where it does not involve the merits of the action or necessarily affect the judgment thereafter rendered.[15] For the same reason the court cannot review an order allowing an amendment to an answer in a divorce action so as to more particularly deny that there was any community property, when the decree of divorce reserves the question as to the division of community property for further consideration.[16] The fact that the appeal is taken by the alternative method does not authorize the court, on appeal from a judgment, to review interlocutory orders directly appealable.[17]

§ 484. Application of Rule.—By virtue of this provision, the following interlocutory orders may be reviewed on an appeal from a final judgment, if properly presented by the record: An order substituting parties;[18] a ruling upon a demurrer;[19] an order striking out a pleading or a part thereof;[20] an order refusing to strike a pleading

15. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

16. Sharon v. Sharon, 77 Cal. 102, 19 Pac. 230.

17. Starkey v. Parker, 30 Cal. App. Dec. 453, 186 Pac. 195.

18. Grant v. Los Angeles & P. Ry. Co., 116 Cal. 71, 47 Pac. 872 (an order substituting parties plaintiff); Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

19. Freeman v. Glenn County Tel. Co., 60 Cal. Dec. 692, 194 Pac. 705; Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680; Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; De La Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Fortain v. Smith, 114 Cal. 494, 46 Pac. 381; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Curtiss v. Bachman, 84 Cal. 216, 24 Pac. 379; Heilbron v. Centerville & K. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932 (holding ruling not reviewable on appeal from order denying new trial); Ashley v. Olmstead, 54 Cal. 616; Agard v. Valencia, 39 Cal. 292; Hibberd v. Smith, 39 Cal. 145; Brunson v. City of Santa Monica, 25 Cal. App. 383, 143 Pac. 792; Dodge v. Northern Electric Ry. Co., 22 Cal. App. 239, 133 Pac. 1161 (not reviewable on appeal from order denying new trial); Hanke v. McLaughlin, 20 Cal. App. 204, 128 Pac. 772; Litch v. Kerns, 8 Cal. App. 747, 97 Pac. 897; Amestoy Estate Co. v. City of Los Angeles, 5 Cal. App. 273, 90 Pac. 42 (an appeal from judgment of dismissal rendered upon a demurrer).

20. Reclamation District v. Hershey, 160 Cal. 692, 117 Pac. 904;

from the files;[1] an order allowing judgment on the pleadings;[2] an order denying a continuance;[3] an order denying a motion for nonsuit;[4] and an order granting a nonsuit.[5] An order modifying the judgment may be reviewed upon an appeal from the judgment as modified,[6] or upon a direct appeal from the order as a special order after judgment.[7]

Inasmuch as the following orders are directly appealable, they cannot be reviewed upon an appeal from a final

Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868; Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171; Frazer v. Lynch, 88 Cal. 621, 26 Pac. 344 (an order striking out an answer for refusal to obey a subpoena duces tecum is not a judgment for contempt and is reviewable on appeal from the judgment and order denying a new trial); Clifford v. Allman, 84 Cal. 528, 24 Pac. 292; Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730; Swain v. Burnette, 76 Cal. 299, 18 Pac. 394; Nevada County & Sacramento Canal Co. v. Kidd, 43 Cal. 180 (that an order striking out a portion of a pleading may be reviewed upon appeal from the judgment is true, but it is equally true that the order itself being no part of the judgment-roll cannot be so reviewed except it be supported by a statement on appeal); Ross v. Flynn, 31 Cal. App. Dec. 647, 189 Pac. 293 (an order striking out an amended complaint and ordering judgment as prayed for in the original complaint may be reviewed upon an appeal from the judgment); Ross v. Flynn, 31 Cal. App. Dec. 647, 189 Pac. 293; Stockton Iron Works v. Walters, 18 Cal. App. 373, 123 Pac. 240. See Overton v. Noyes, 177 Cal. 450, 170 Pac. 1110, not reviewing order because it could not be ascertained therefrom what parts of the complaint were stricken out.

1. Myers v. Holton, 9 Cal. App. 114, 98 Pac. 197.

2. Since a motion for judgment on the pleadings is in effect a general demurrer to a complaint, a ruling on such motions is reviewable on an appeal from the judgment. Evans v. Paige, 102 Cal. 132, 36 Pac. 406; Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

3. Haraszthy v. Horton, 46 Cal. 545.

4. Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Leavens v. Pinkham etc., 164 Cal. 242, 128 Pac. 399; Fraser v. Sheldon, 164 Cal. 165, 128 Pac. 33. See supra, this section, as to necessity that order affect judgment.

5. Converse v. Scott, 137 Cal. 239, 70 Pac. 13. Errors in rulings admitting or rejecting evidence may not be considered on a motion for a nonsuit, or upon an appeal from a judgment entered upon an order granting a nonsuit. Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426.

6. Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360, an order striking out the costs from the judgment.

7. See supra, § 30.

judgment: An order denying a motion for a change of place of trial;[8] an order transferring an action to some court because of disqualification of the judge;[9] an order dissolving an attachment;[10] interlocutory judgment in divorce;[11] interlocutory order in partition;[12] and an order vacating a former judgment in the cause.[13]

Attachment.—An order refusing to dissolve an attachment cannot be reviewed on appeal from the judgment for the reason that such order does not affect the judgment,[14] and also for the reason that under the present procedure the order is directly appealable.[15] But even though it were not appealable, it could not be reviewed on such appeal for the reason first given.

References.—Upon an appeal from a final judgment, the appellate court may review an order setting aside a report of a referee appointed to take an account,[16] or to take testimony,[17] an order overruling exceptions to a referee's report,[18] and the action of the court upon the reports of referees who have resigned or died or have suffered other disability.[19]

Orders as to costs.—When made before judgment, the court upon an appeal from the judgment may review an order settling a cost bill,[20] an order on a motion to retax

8. Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981; Starkey v. Parker, 30 Cal. App. Dec. 453, 186 Pac. 195.

9. Broder v. Conklin, 98 Cal. 360, 33 Pac. 211.

10. See infra, this section.

11. Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28.

12. Holt v. Holt, 131 Cal. 610, 63 Pac. 912; Quirk v. Rooney, 130 Cal. 505, 62 Pac. 825; Barry v. Barry, 56 Cal. 10; Regan v. McMahon, 43 Cal. 625.

13. Hamlin v. His Creditors, 2 Cal. Unrep. 203. See infra, § 485.

14. Herman v. Paris, 81 Cal. 625, 22 Pac. 971; Allender v. Fritts, 24 Cal. 447; Nail v. Superior Court, 11 Cal. App. 27, 103 Pac. 902.

15. Code Civ. Proc., § 956; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81. See ATTACHMENT.

16. Johnston v. Dopkins, 6 Cal. 83.

17. Baker v. Baker, 10 Cal. 527.

18. Hihn v. Peck, 30 Cal. 280.

19. Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381. See REFERENCES.

20. Irrgang v. Ott, 9 Cal. App. 440, 99 Pac. 528.

costs,[1] and an order on motion to strike out a cost bill.[2] Such orders when made after judgment are directly appealable as special orders made after final judgment,[3] and are not reviewable on appeal from the judgment.[4] But where costs are allowed in a judgment in the first instance, subsequent proceedings striking out a cost bill and retaxing costs have been held to be proceedings having relation to the judgment and to become a part of it so as to be reviewable upon appeal from the judgment.[5]

§ 485. Subsequent Orders and Order on Motion for New Trial.—On an appeal from the final judgment, the court could not, prior to 1915, consider special orders made thereafter;[6] nor review an order denying a motion to vacate the judgment appealed from.[7] In 1915, when the right of appeal from an order on a motion for a new trial was abolished except in the single case specified in section 963 of the Code of Civil Procedure, the legislature provided for a

1. Dooly v. Norton, 41 Cal. 439; Lasky v. Davis, 33 Cal. 677; Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107; Levy v. Getleson, 27 Cal. 685.

2. Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Flubacher v. Kelly, 49 Cal. 116, explained in Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810.

3. See supra, § 29.

4. Jones v. Frost, 28 Cal. 245 (holding an order adding costs to the judgment after the perfection of an appeal therefrom cannot be considered).

5. Quitzow v. Perrin, 120 Cal. 255, 52 Pac. 632, distinguished in Engel v. Ehret, 21 Cal. App. 112, 130 Pac. 1197. In rendering its decision the court was influenced by Fairbanks v. Lampkin, 99 Cal. 429, 34 Pac. 101, which holds that where an order as to costs is less than three hundred dollars, the appellate court is without jurisdiction of an appeal therefrom. This case, as already shown, was expressly overruled in Harron v. Harron, 123 Cal. 508, 56 Pac. 334 (see supra, § 51), and, therefore, it is doubtful whether Quitzow v. Perrin, 120 Cal. 255, 52 Pac. 632, may now be regarded as authority upon this point. See COSTS.

6. McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730 (conceding that an order to show cause is appealable, the court on an appeal therefrom cannot review a subsequent and final order made as a result of the hearing thereon); McCourtney v. Fortune, 42 Cal. 387. See supra, § 484, as to orders relating to costs.

7. Jenness v. Bowen, 77 Cal. 310, 19 Pac. 522; Boos v. Byrnes, 33 Cal. App. 755, 166 Pac. 596.

review of such order on an appeal from the judgment, something that previously could not be done.[8] It is thus apparent that notwithstanding the abolition of the right of appeal, the right of review of such order was preserved.[9] It was the clear intent of the legislature in taking away the right of appeal from an order denying a new trial by the amendment of 1915 to provide for a review of all matters that might be considered on such an appeal on an appeal from the judgment.[10]

As the remedy for a refusal to settle a statement on motion for new trial is mandamus, it follows that such refusal cannot be reviewed either on appeal from the judgment or an order denying a new trial.[11]

Review upon Appeal from Order on Motion for New Trial.

§ 486. In General.—Upon an appeal from an order upon a motion for a new trial, when allowed,[12] the appellate court is limited in its review of the action of the trial court to the grounds upon which such a motion was based,[13] and upon which the new trial was asked in the

8. Schmitt v. White, 172 Cal. 554, 158 Pac. 216.

9. Regoli v. Stevenson, 179 Cal. 257, 176 Pac. 158; Wilcox v. Hardisty, 177 Cal. 752, 171 Pac. 947; Linn v. Piersol, 37 Cal. App. 171, 173 Pac. 763; Nathan v. Porter, 36 Cal. App. 356, 172 Pac. 170; White v. Hendley, 35 Cal. App. 267, 169 Pac. 710. Formerly, such orders were directly appealable, and therefore they are not reviewable on appeal from final judgment. See the following cases: Day v. Callow, 39 Cal. 593, 597; Hihn v. Peck, 30 Cal. 280.

10. Wilcox v. Hardisty, 177 Cal. 752, 171 Pac. 947; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121. See infra, §§ 486–489, inclusive, as to matters reviewable on appeal from order on motion for new trial.

11. Estudillo v. Security Loan & Trust Co., 158 Cal. 66, 109 Pac. 884; Hartman v. Smith, 140 Cal. 461, 74 Pac. 7; Machado v. Kinney, 135 Cal. 354, 67 Pac. 331. See supra, § 35; and generally, see MANDAMUS.

12. See supra, § 34.

13. Fagan v. Lentz, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951; Stewart v. Stewart, 156 Cal. 651, 105 Pac. 955; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Crescent Feather Co. v. United Upholsterers'

particular case.[14] The sole object of an appeal from an order granting a new trial is to determine whether the court erred in granting the motion on the record made up by the moving party, in respect of any one or all the grounds stated in the specifications presented by the moving party.[15] And nothing can be considered on the appeal that does not go to show that a re-examination of fact is necessary for the protection of the rights of the appealing party.[16] This precludes a review of errors apparent upon the face of the judgment-roll,[17] such as, for

Union, 153 Cal. 433, 95 Pac. 871; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234 (order granting new trial); Jacks v. Buell, 47 Cal. 162; Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107; Stockton Iron Wks. v. Walters, 18 Cal. App. 373, 123 Pac. 340.

14. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Stewart v. Stewart, 156 Cal. 651, 105 Pac. 955; Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 Pac. 1090; Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Marsteller v. Leavitt, 130 Cal. 149, 62 Pac. 384; Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940 (grounds for new trial specified in the motion but not urged or considered in the lower court will not be reviewed); Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Heilbron v. Centerville & K. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932 ("Only such errors can be considered as are specified in the statement"); Moore v. Murdock, 26 Cal. 514; Yaeger v. Southern California Ry. Co., 5 Cal. Unrep. 870, 51 Pac. 190; A. E. Baranger & Co. v. Meyer, Cahn & Talbott, 34 Cal. App. 158, 166 Pac. 862; Bloxham v. Tehama County Tel. Co., 29 Cal. App. 326, 155 Pac. 654; Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801 (an error in denying leave to amend cannot be reviewed unless a new trial was asked on the ground of irregularity in an "order of the court or abuse of discretion by which either party was prevented from having a fair trial"); Sebring v. Harris, 20 Cal. App. 56, 128 Pac. 7. Upon an appeal from an order granting a new trial, the court can only consider the questions raised and determined by the court below on the motion. De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847.

15. Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

16. Estate of Keating, 162 Cal. 406, 122 Pac. 1079; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62.

17. Thompson v. City of Los Angeles, 125 Cal. 270, 57 Pac. 1015; Estate of Westerfield, 96 Cal. 113, 30 Pac. 1104; Thompson v. Patter-

example, the insufficiency of the complaint[18] or findings[19] to support the judgment. Upon such an appeal the court cannot review a refusal of the court to settle a statement, on new trial,[20] the remedy in such case being mandamus;[1] or an error in the allowance of costs.[2]

§ 487. Errors of Law Occurring on the Trial.—When specified by the moving party as grounds for new trial, the court, upon appeal from the order on the motion, may review errors of law occurring at the trial,[3] excepted to by the moving party,[4] whether the decision is against the law,[5] questions relating to misconduct of the jury,[6] and the sufficiency of the evidence to sustain the verdict or

son, 54 Cal. 542. But see Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; Hanscom v. Tower, 17 Cal. 518 ("There is nothing in the point that error cannot be assigned upon the judgment-roll").

18. See infra, § 488.

19. See infra, § 489.

20. Estudillo v. Security Loan & Trust Co., 158 Cal. 66, 109 Pac. 884; Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7.

1. Machado v. Kinney, 135 Cal. 354, 67 Pac. 331. See Miller v. Beveridge, 1 Cal. Unrep. 332, holding that where no order denying a motion for new trial was ever made, an order striking out a statement on motion for new trial will not be treated as such an order, so as to review such order on an appeal purporting to be from an order denying a new trial. See supra, § 485, note 11.

2. Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107.

3. Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Andrews v. Wilbur, 5 Cal. Unrep. 144, 41 Pac. 790; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383. See infra, this section. The rule is established that upon an appeal from an order granting a new trial "solely upon errors of law" the appellate court is limited in its review to errors appearing in the record, exclusive of the sufficiency of conflicting evidence to justify the decision. Winchester v. Becker, 8 Cal. App. 363, 97 Pac. 74.

4. When the motion for new trial was made by the plaintiff, the court cannot consider errors of law committed at the trial and excepted to by the defendant. De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152.

5. Cargnani v. Cargnani, 16 Cal. App. 96, 116 Pac. 306.

6. A refusal of the trial court to hear read affidavits of jurors tending to impeach a verdict is reviewable on appeal from an order denying a new trial. Salzman v. Sunset Telephone & T. Co., 125 Cal. 501, 58 Pac. 169.

decision.[7] As errors of law occurring at the trial, the court may review errors in the rulings upon the admissibility of evidence.[8] So, also, it may review a ruling of the court in granting or refusing a nonsuit,[9] whether made upon an offer of proof by counsel or after the close of the evidence in the case.[10] But the court cannot, on such appeal, examine whether the findings support the conclusions of law, or the judgment;[11] as this is not "a decision against law" under the authorities in the state. This error can be taken advantage of only upon an appeal from the judgment.[12]

7. Robinson v. Eberhart, 148 Cal. 495, 83 Pac. 452; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Wadman v. Burke, 147 Cal. 351, 3 Ann. Cas. 330, 1 L. R. A. (N. S.) 1192, 81 Pac. 1012; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Robinson v. Eberhart, 148 Cal. 495, 83 Pac. 452; Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Andrews v. Wilbur, 5 Cal. Unrep. 144, 41 Pac. 790; Suisun Lumber Co. v. Fairfield School Dist., 19 Cal. App. 587, 127 Pac. 349; Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383; Houghton Co. v. Kennedy, 8 Cal. App. 777, 97 Pac. 905; Burns v. Schoenfeld, 1 Cal. App. 121, 81 Pac. 713. See supra, § 407, as to necessity that insufficiency of evidence be specified in the bill of exceptions.

8. Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234; Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681.

9. Green v. Duvergey, 146 Cal. 379, 80 Pac. 234; Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846; Johnson v. Southern Pacific Co., 11 Cal. App. 278, 104 Pac. 713. See infra, § 489.

10. Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

11. Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794; Mentone Irr. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Swift v. Occidental Min. & P. Co., 7 Cal. Unrep. 23, 70 Pac. 470, in department, 141 Cal. 161, 74 Pac. 700, in bank, overruling Simmons v. Hamilton, 56 Cal. 493; Strouse v. Sylvester, 6 Cal. Unrep. 798, 66 Pac. 660; Raskin v. Robarts, 4 Cal. Unrep. 465, 35 Pac. 763; Bloxham v. Tehama County Tel. Co., 29 Cal. App. 326, 155 Pac. 654.

12. Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124; Brison v.

Decision against law.—If there is a failure to find upon a material issue, the decision is against law, and may be reviewed upon an appeal from an order upon motion for a new trial.[13]

§ 488. Matters as to Pleadings and Parties.—It is well established that the court cannot, upon an appeal from an order on motion for new trial, consider questions relating to the sufficiency of the complaint.[14] The correctness of

Brison, 90 Cal. 323, 27 Pac. 186; Mazkewitz v. Pimental, 83 Cal. 450, 23 Pac. 527; In re Doyle, 73 Cal. 565, 15 Pac. 125; Hayford v. Wallace, 5 Cal. Unrep. 489, 46 Pac. 301 (citing the above authorities, and in which the court referring to Simmons v. Hamilton, 56 Cal. 493, says that it seems to hold a contrary doctrine, but that this last-named decision was concurred in by only two judges and has not been followed). See infra, §§ 487, 489.

13. Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700; Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303 (where a referee empowered to try the issues failed to find on a material issue); Adams v. Helbing, 107 Cal. 298, 40 Pac. 422 (order granting new trial); Knight v. Roche, 56 Cal. 15; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383 (by supreme court in denying a rehearing); Winchester v. Becker, 8 Cal. App. 363, 97 Pac. 74 (order granting new trial). But see Morse v. Wilson, 138 Cal. 558, 71 Pac. 801.

14. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794; Shaw v. Shaw, 160 Cal. 733, 117 Pac. 1048; Stewart v. Stewart, 156 Cal. 651, 105 Pac. 955; Land v. Johnstone, 156 Cal. 253, 104 Pac. 449; Younger v. Moore, 155 Cal. 767, 103 Pac. 221; Dundas v. Lankershim School Dist., 155 Cal. 692, 102 Pac. 925; Crescent Feather Co. v. United Upholsterers, 153 Cal. 433, 95 Pac. 871; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; County Bank v. Jack, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705 (whether the appeal is by the defendant from an order denying his motion for a new trial, or is taken by a plaintiff from an order denying his motion for a new trial, and the defendant contends that the judgment should be affirmed because of the insufficiency of the complaint, is immaterial. In either case the sufficiency of the complaint is not reviewable); Green v. Duvergey, 146 Cal. 379, 80 Pac. 234; Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62; Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761 (order granting new trial); Swett v. Gray, 141 Cal. 63, 74 Pac. 551; White v.

the order must be determined by the record upon which it rests. On the hearing of the motion, reference may be had to the pleadings, but only for the purpose of ascertaining the issues in the case, and determining the correctness of any ruling upon objection to the introduction of evidence on the ground that it was not within the issues. The sufficiency of the complaint, however, is not involved in the re-examination of an issue of fact after a trial and decision by a court or jury, and is not therefore reviewable.[15] It is true that this rule deprives a successful defendant of the means at this stage of the proceedings of having his demurrer passed upon, as he cannot appeal from the judgment because he is the prevailing party. He may, however, have the sufficiency of the complaint reviewed by refusing to answer when his demurrer was overruled, and appealing from the judgment for the plain-

Costigan, 138 Cal. 564, 72 Pac. 178; Lambert v. Marcusa, 137 Cal. 44, 69 Pac. 620; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Reclamation District v. Thisby, 131 Cal. 572, 63 Pac. 918; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90 (the rule applicable in case of a denial of the motion is applicable on appeal from an order granting the motion); Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847 (order granting new trial); Hall v. Susskind, 120 Cal. 559, 53 Pac. 46; In re Redfield, 116 Cal. 637, 48 Pac. 794 (petition to revoke probate); Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Evans v. Paige, 102 Cal. 132, 36 Pac. 406; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119; Onderdonk v. San Francisco, 75 Cal. 536, 17 Pac. 678; Jacks v. Buell, 47 Cal. 162; Mason v. Austin, 46 Cal. 385; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Swift v. Occidental Min. & P. Co., 7 Cal. Unrep. 23, 70 Pac. 470, in department; 141 Cal. 161, 74 Pac. 700, in bank; Chambers v. Farnham, 39 Cal. App. 17, 179 Pac. 423 (order granting new trial); Bloxham v. Tehama County Tel. Co., 29 Cal. App. 326, 155 Pac. 654; Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801; Clark v. Torchiana, 19 Cal. App. 786, 127 Pac. 831 (order granting new trial); Stockton Iron Wks. v. Walters, 18 Cal. App. 373, 123 Pac. 240; West v. Mears, 17 Cal. App. 718, 121 Pac. 700; Spaeth v. Ocean Park Realty M. & I. Co., 16 Cal. App. 329, 116 Pac. 980; Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681; Blodgett v. Scott, 11 Cal. App. 310, 104 Pac. 842 (by supreme court in denying a rehearing); Sheakley v. Nelson, 13 Cal. App. 379, 109 Pac. 891; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383.

15. Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Bode v. Lee, 102 Cal. 583, 36 Pac. 936.

tiff thereon, or he may, if the order granting a new trial is affirmed, renew his demurrer. On the other hand, to permit the defendant to raise the question on appeal from an order granting a new trial would be a hardship on the plaintiff, who would have no remedy if the court should hold the complaint fatally bad.[16] Similar considerations preclude a review of the sufficiency of an answer.[17] As demurrers go to the sufficiency of the pleadings, it is settled that rulings on demurrers cannot be reviewed upon such appeal.[18] So, also, the court cannot, upon appeal from an order on new trial, review orders upon motions to strike out pleadings,[19] or questions as to the form of action.[20] This rule precludes a review upon an appeal from an order on motion for new trial of an error in overruling an objection to the reception of any evidence, because no cause of action was stated in the complaint, as the objection is in effect a demurrer to the complaint upon that ground.[1] Where, however, the motion for nonsuit is based upon the insufficiency of the evidence, the ruling thereon is

16. Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847.

17. Clark v. Torchiana, 19 Cal. App. 786, 127 Pac. 831.

18. Stewart v. Stewart, 156 Cal. 651, 105 Pac. 955; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Heilbron v. Centerville & K. Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035; Tingey v. Callahan Const. Co., 28 Cal. App. 777, 154 Pac. 28; Stockton Iron Wks. v. Walters, 18 Cal. App. 373, 123 Pac. 240; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383.

19. Reclamation District v. Hershey, 160 Cal. 693, 117 Pac. 904; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234; Tingey v. Callahan Const. Co., 28 Cal. App. 777, 154 Pac. 28.

20. Morse v. Wilson, 138 Cal. 558, 71 Pac. 801.

1. Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Spaeth v. Ocean Park Realty M. & I. Co., 16 Cal. App. 329, 116 Pac. 980. But see Waugenheim v. Graham, 39 Cal. 169, holding that upon an appeal from an order denying a new trial, the court may review an error in overruling an objection to the admission of evidence offered in support of a counterclaim, on the ground that the facts if proved constitute no defense to the action or a sufficient basis for a cross-demand.

reviewable upon appeal from an order denying a motion for a new trial;[2] and it has been held that where the motion for nonsuit challenges the sufficiency of the complaint in that it sets forth a contract on which an action could not be maintained, and where the ruling of the court on the motion for nonsuit and the exception thereto have been embodied in a bill of exceptions on motion for new trial, such ruling may be reviewed as an error of law occurring on the trial, upon appeal from the order.[3]

Parties.—The question of a defect of parties is not reviewable upon appeal from an order upon a motion for new trial.[4]

§ 489. **Matters Relating to Findings, Verdict and Judgment.**—Upon an appeal from an order on motion for new trial, the court cannot review the sufficiency of the verdict[5] or findings[6] to support the judgment. The court

2. See supra, § 487, note 9.

3. Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.

But see Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383, per Chipman, P. J., which seems to hold that an order denying a nonsuit upon the sole ground of the insufficiency of the complaint is not reviewable upon appeal from an order on motion for new trial. Referring to the latter case, Justice Chipman, in Johnson v. Southern Pacific Co., 11 Cal. App. 278, 104 Pac. 713, said that the text of the opinion, "it must be confessed is not quite clear as to what was intended to be held."

4. Smith v. Cucamonga Water Co., 160 Cal. 611, 117 Pac. 764; Lamb v. Hall, 147 Cal. 37, 81 Pac. 286.

5. Morse v. Wilson, 138 Cal. 558, 71 Pac. 801.

6. Beckley v. Gasoline Steamer "Topo," 176 Cal. 241, 168 Pac. 121; Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; Fagan v. Lentz, 156 Cal. 681, 20 Ann. Cas. 221, 105 Pac. 951; Land v. Johnston, 156 Cal. 253, 104 Pac. 449; Younger v. Moore, 155 Cal. 767, 103 Pac. 221; Dundas v. Lankershim School Dist., 155 Cal. 692, 102 Pac. 925; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Crescent Feather Co. v. United Upholsterers' Union, 153 Cal. 433, 95 Pac. 871; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Bell v. Staacke, 151 Cal. 544, 91 Pac. 322; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661; Swift v. Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; White v. Costigan, 138 Cal. 564, 72 Pac. 178; Hunter v. Milam, 133 Cal. 601, 65

cannot therefore review the question whether certain findings are outside of the issues,[7] whether the findings contradict or are at variance with the pleadings,[8] or whether the conclusions of law are properly drawn from the findings.[9] Neither can it review questions as to the form of or correctness of the judgment,[10] such as the following, for example: Whether the complaint supports the conclusions of law or findings or the judgment based thereon;[11] whether the relief awarded is warranted by the facts

Pac. 1079; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304; Strouse v. Sylvester, 6 Cal. Unrep. 798, 66 Pac. 660; Hayford v. Wallace, 5 Cal. Unrep. 489, 46 Pac. 301; Larue v. Chase, 1 Cal. Unrep. 613; Stockton Iron Works v. Walters, 18 Cal. App. 373, 123 Pac. 240; Union Collection Co. v. Rogers, 18 Cal. App. 205, 122 Pac. 970; West v. Mears, 17 Cal. App. 718, 121 Pac. 700; Bennett v. Potter, 16 Cal. App. 183, 116 Pac. 681; Sheakley v. Nelson, 13 Cal. App. 379, 109 Pac. 891; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383; Burns v. Schoenfeld, 1 Cal. App. 121, 81 Pac. 713.

A delay in filing findings is not reviewable upon an appeal from an order denying a new trial. Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 205.

7. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124.

8. Shaw v. Shaw, 160 Cal. 733, 117 Pac. 1048; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299.

9. See supra, § 487.

10. Foster v. Butler, 164 Cal. 623, 130 Pac. 6; Davis v. Butler, 154 Cal. 623, 98 Pac. 1047; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Williams v. Long, 139 Cal. 186, 72 Pac. 911; People v. Rodgers, 118 Cal. 393, 401, 46 Pac. 740, 50 Pac. 668 (opinion in department adhered to by McFarland, J., dissenting); Bode v. Lee, 102 Cal. 583, 36 Pac. 936; In re Westerfield, 96 Cal. 113, 30 Pac. 1104; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Martin v. Matfield, 49 Cal. 42 (whether judgment is against law cannot be determined); Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035.

11. Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847. See supra, § 488.

granted;[12] or whether there are errors as to the amount of the judgment.[13]

Review upon Other Appeals.

§ 490. On Appeal from Interlocutory Orders and Orders After Final Judgment.—Upon an appeal from interlocutory orders or special orders made after final judgment, the appellate court may review only the questions raised by the order appealed from, and it cannot review errors assigned on other orders not involved in the order appealed from.[14] Upon an appeal from an order on a motion made under section 663 of the code to set aside a judgment and enter a different judgment, the court may review the question whether the conclusions of law are consistent with and supported by the findings,[15] or whether the judgment or decree is consistent with and supported by a special verdict.[16] But as an appeal from a special order made after final judgment cannot be considered as an appeal from the judgment in the action, the judgment and the proceedings on which the judgment depends cannot be reviewed on such appeal.[17] So, also, an objection that the evidence is insufficient to sustain the findings cannot be reviewed on an appeal from an order refusing to vacate a judgment.[18] Again, upon an appeal from an order deny-

12. Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

13. Darfee v. Seale, 139 Cal. 603, 73 Pac. 435 (objection to the allowance of interest); Rockwell v. Light, 6 Cal. App. 564, 92 Pac. 649.

14. Poole v. Wilber, 95 Cal. 339, 30 Pac. 548 (upon an appeal from an order allowing alimony pendente lite, the appellate court cannot determine the issues raised by the pleadings or review an order overruling a demurrer to the complaint).

15. Mentone Irr. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082; Newark Trust Co v. Kriebel, 33 Cal. App. Dec. 356, 193 Pac. 962; Keller v. Cliver, 34 Cal. App. 390, 167 Pac. 551.

16. Code Civ. Proc., § 663.

17. Cross v. Mayo, 167 Cal. 594, 140 Pac. 283.

18. Lindley v. Lindley, 33 Cal. App. Dec. 383, 194 Pac. 85 (where it was objected, on appeal from an

ing a motion by a plaintiff to vacate an entry of default, errors in substituting a defendant as a party in the action, and the sufficiency of the complaint to state a cause of action against him, are not reviewable.[19]

§ 491. Upon Other Appeals.—An objection to the sufficiency of a complaint cannot be considered on a motion to dismiss an action, and cannot be considered on appeal from an order granting such motion.[20] A proceeding for the appointment of a receiver is not a special proceeding, but is a proceeding auxiliary to the action in aid of which the receiver is appointed, and therefore an order made after final judgment directing the receiver to pay over moneys in his hands is not a final judgment in a special proceeding, but a special order after judgment, so that upon an appeal therefrom the order appointing the receiver is not reviewable.[1] Since a deficiency judgment in a mortgage foreclosure suit is merely an incident to the judgment of foreclosure, because it was adjudged in the original decree that the plaintiff was entitled to that relief, the sufficiency of the complaint cannot be determined on an appeal from such a deficiency judgment.[2]

On appeals in probate proceedings.—On appeal from a final order or judgment admitting a will to probate, the court may review any nonappealable, intermediate ruling the court may make, and may review an order dismissing a contest of the probate for lack of interest,[3] and an order sustaining a demurrer to the contest for the same reason.[4] But since the validity of trust clauses in a will is not an

order refusing to set aside a decree of default and interlocutory divorce, that the evidence was insufficient to prove the jurisdictional fact of residence).

19. Thompson v. Alford, 135 Cal. 52, 66 Pac. 983.

20. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352.

1. Whitney v. Buckman, 26 Cal. 447.

2. Cunnison v. Miller, 34 Cal. App. 267, 167 Pac. 890.

3. Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 961.

4. In re Hickman, 101 Cal. 609, 36 Pac. 118.

issue in the proceeding to have the will probated, their validity cannot be reviewed upon appeal from an order admitting or refusing probate of the will.[5] Upon appeal from an order settling a personal representative's account, all the proceedings leading up to it, including the evidence on which it is based, are open to review.[6]

II. PERSONS ENTITLED TO ALLEGE ERRORS.

§ 492. In General.—It is a well-settled general rule that upon an appeal only such errors will be reviewed as are urged by the appellant as ground for reversal.[7] Errors affecting a party who does not appeal will not be reviewed, even though excepted to by him in the trial court and included in a bill of exceptions.[8] A respondent in whose favor a judgment is rendered is interested only in maintaining the judgment, and he cannot on an appeal of the opposite party ask a court of review to consider any errors against him.[9] As said in an early case: "It is not

5. Estate of Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340.

6. In re Rose, 80 Cal. 166, 22 Pac. 86. A prior order vacating a decree settling a final account may be reviewed: Estate of Hickey, 121 Cal. 378, 53 Pac. 818; Estate of Cahalan, 70 Cal. 604, 12 Pac. 427.

7. Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246.

8. Ambrose v. Drew, 139 Cal. 665, 73 Pac. 543; Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876; Vanderslice v. Matthews, 79 Cal. 273, 21 Pac. 748 (holding upon an appeal by a defendant from a judgment for costs in his favor upon the allowance of a set-off against the plaintiff's claim, no question as to the correctness of the judgment against the plaintiff can be considered, if he does not appeal); McCreery v. Everding, 44 Cal. 284; Hathaway v. Brady, 23 Cal. 121. See cases cited infra, this section. See infra, § 570 et seq., as to extent of relief granted.

9. Kern Oil Co. v. Crawford, 143 Cal. 298, 3 L. R. A. (N. S.) 993, 76 Pac. 1111 (respondent cannot question findings); Benson v. Bunting, 141 Cal. 462, 75 Pac. 59; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Coyle v. Lamb, 123 Cal. 264, 55 Pac. 901 (respondent cannot complain of errors in admission of evidence); Estate of Olmstead, 122 Cal. 224, 54 Pac. 745; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Mattingly v. Pennie, 105 Cal. 515, 45 Am. St. Rep. 87, 39 Pac. 200; Klauber v. San Diego St. Car Co., 98 Cal. 105,

errors committed against the successful party which we notice on appeal, but those committed against the party complaining.''[10] An appellate court cannot correct an error as to a party who does not join in the appeal,[11] but it may affirm the judgment as to him and reverse as to the appellant.[12] A party who does not join in a motion for new trial cannot complain of error in denying the motion.[13]

Where a plaintiff and others as cross-defendants join in one answer, without asking the court to litigate their rights as against each other, and also join in an appeal, they cannot complain that the court did not adjust their rights among themselves. The proper procedure in such case is for them to ask appropriate relief in their pleading and for the one considering himself aggrieved to appeal, making the others respondents.[14]

§ 493. Errors Injuriously Affecting Appellant.—An appellant is entitled to assign for error only such proceedings in the trial court as injuriously affect him, without regard to errors of which others might complain.[15] He

32 Pac. 876; Bryan v. Idaho Quartz Min. Co., 73 Cal. 249, 14 Pac. 859; Dougherty v. Henarie, 47 Cal. 9; Poppe v. Athearn, 42 Cal. 606; Seaward v. Malotte, 15 Cal. 304; Travers v. Crane, 15 Cal. 12; Jackson v. Feather River Water Co., 14 Cal. 18; Madden v. Ashman, 1 Cal. Unrep. 583. See supra, §§ 56, 57.

It is a general rule that courts will not listen to a party who seeks the reversal of a judgment in his own favor, unless he can make it appear that the judgment should have been for a greater amount or a wider scope. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

10. Seaward v. Malotte, 15 Cal. 304.

11. If an order granting a nonsuit is erroneous as to one of several defendants, the error cannot be corrected on an appeal of the remaining defendants in which he does not join. McCreery v. Everding, 44 Cal. 284.

12. See infra, § 570 et seq.

13. Calderwood v. Brooks, 28 Cal. 151.

14. De Bairos v. Barlin, 31 Cal. App. Dec. 853, 190 Pac. 188.

15. McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355; East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 Pac. 999; Greenlee v. Los Angeles Trust & S.

cannot complain of errors favorable to him,[16] neither can he complain of errors which injuriously affect only the respondent,[17] or which affect only his coparties who are

Bank, 171 Cal. 371, 153 Pac. 383; Dayton v. McAllister, 129 Cal. 192, 61 Pac. 913; Smith v. Hawkins, 127 Cal. 119, 59 Pac. 295; Estate of Young, 123 Cal. 337, 55 Pac. 1011; Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Pearson v. Creed, 78 Cal. 144, 20 Pac. 302 (a defendant in quiet title suit without title cannot object to an award of a part of the premises to an intervener); People ex rel. Attorney General v. Reis, 76 Cal. 269, 18 Pac. 309 (a judgment will not be reversed on the appeal of a party not aggrieved by it); McCreery v. Everding, 44 Cal. 284; People v. Wilson, 26 Cal. 127; Dennis v. Table Mountain Water Co., 10 Cal. 368; Tryon v. Clinch, 30 Cal. App. Dec. 756, 186 Pac. 1042; Martin v. Stockton, 39 Cal. App. 552, 179 Pac. 894 (uncertainty in judgment not affecting appellant); Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258; Donnellan v. Wood, Curtis & Co., 4 Cal. App. 192, 89 Pac. 235; People ex rel. Hardacre v. Rea, 2 Cal. App. 109, 83 Pac. 165.

A legatee cannot complain of the distribution of property in which he has no interest. Estate of Coursen, 6 Cal. Unrep. 756, 65 Pac. 965.

An heir who is interested in an estate only in case the deceased died intestate cannot question the construction of the court given to the will. Estate of Young, 123 Cal. 337, 55 Pac. 1011.

16. Reher v. Reed, 179 Cal. 235, 176 Pac. 170 (erroneous findings favorable to appellant); Asebez v. Bliss, 178 Cal. 137, 172 Pac. 595 (where a judgment against a defendant was amended by striking therefrom an award of certain percentage of damages); Estate of Kilborn, 158 Cal. 593, 112 Pac. 52 (where the court does not submit certain defenses to the jury because unsupported by evidence, the plaintiff cannot complain); Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. 1003; Benson v. Bunting, 141 Cal. 462, 75 Pac. 59 (a defendant in a suit to redeem cannot complain of the amount of interest allowed to him after his repudiation of the plaintiff's right to redeem); Larkin v. Mullen, 128 Cal. 449, 60 Pac. 1091 (error in judgment favorable to appellant); Kennedy-Shaw Lumber Co. v. Priet, 113 Cal. 291, 45 Pac. 336 (where judgment gave appellant more than he was entitled to); Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200 (error in verdict favorable to appellant); Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; Wixon v. Devine, 80 Cal. 385, 22 Pac. 224; O'Connor v. Flynn, 2 Cal. Unrep. 484, 7 Pac. 188; Barnard v. McIntire, 31 Cal. App. Dec. 51, 187 Pac. 440 (the propriety of that portion of a judgment in favor of the appellant is not open to review); Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 193, 111 Pac. 519, 527 (instruction favorable to appellant).

17. Fairchild v. Bay Point & C. R. Co., 22 Cal. App. 328, 134 Pac. 338 (a defendant cannot complain that a judgment for several plaintiffs is not several in character and does

not in privity with him and do not appeal.[18] Such errors can be reviewed only at the instance of the parties affected thereby.

Because the error is favorable to him, a plaintiff cannot complain of a denial of a motion for nonsuit made by the defendant;[19] nor can a defendant complain that the court failed to award the plaintiff all he is entitled to,[20] or reduced the amount of his liability.[1] One of two defendants cannot complain of an error in sustaining a demurrer interposed by the other. The error in such case being against the plaintiff cannot be reviewed if the plaintiff does not appeal.[2] The same principle precludes a party from complaining of a ruling of a trial court excluding

not specify the amount to which each plaintiff is entitled); Madary v. Fresno, 20 Cal. App. 91, 128 Pac. 340.

18. Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323; Simpson v. Gamache, 134 Cal. 216, 66 Pac. 222 (where there was an error in judgment affecting codefendant not appealing); March v. Barnet, 114 Cal. 375, 46 Pac. 152 (objections made upon demurrer to the complaint affecting codefendants not appealing will not be considered); Malone v. Bosch, 104 Cal. 680, 38 Pac. 516 (where there was an irregularity in entering a judgment against a defendant without entering his default); Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328; McDonald v. Taylor, 89 Cal. 42, 26 Pac. 595 (where a finding against a defeated defendant was insufficient); Tripp v. Duane, 74 Cal. 84, 15 Pac. 439 (a defendant in a quiet title suit cannot complain of that part of the decree quieting title to other parties not appealing); Cross v. Eureka Lake & Y. Canal Co., 73 Cal. 302, 2 Am. St. Rep. 808, sub nom. Cross v. Reid, 14 Pac. 885 (a plaintiff adjudged to have no right to money sued for cannot object to a judgment determining the rights of other parties thereto); Gates v. Salmon, 46 Cal. 361; Ricketson v. Richardson, 26 Cal. 147; Wheelock v. Godfrey, 4 Cal. Unrep. 399, 35 Pac. 320 (where a judgment against a plaintiff adjudicates the rights of the defendants as between themselves); Simon v. McCoy, 28 Cal. App. 523, 153 Pac. 406 (plaintiff cannot complain of judgment adjudicating rights of defendants inter se).

19. Hobbs v. Nunn (Cal.), 11 Pac. 32; Klumpke v. Ackerson, 2 Cal. Unrep. 653, 11 Pac. 31.

20. Payne v. Commercial Nat. Bank, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; McPherson v. Great Western Milling Co., 30 Cal. App. Dec. 669, 186 Pac. 803; Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719.

1. Creely v. Cohen, 35 Cal. App. 642, 170 Pac. 643.

2. People v. Leet, 23 Cal. 161.

evidence offered by the opposite party,[3] and precludes a defendant from complaining of a failure to render judgment against his codefendant in a case where there is no right of contribution.[4]

One who does not assail a finding that he has no interest in the subject of the litigation cannot object to errors in the proceedings. Thus, where there is a finding that an alleged heir is not related to a decedent, and such alleged heir does not attack the finding as being unsupported by the evidence, he cannot complain of a decree distributing the decedent's estate.[5] So, also, one who is ousted from an office and who does not assail a finding that he was not elected thereto cannot complain of that part of the decree adjudging that another is entitled to the office.[6]

§ 494. Errors Affecting Coparties.—The rule forbidding an appellant from urging as grounds for reversal errors affecting only his coparties who do not appeal[7] precludes a defendant from complaining of defects in the

3. Du Val v. Boos Bros. Cafeteria Co., 31 Cal. App. Dec. 98, 187 Pac. 767; Globe Grain & Milling Co. v. Drenth, 41 Cal. App. 604, 183 Pac. 285; Donnelly v. Donnelly, 26 Cal. App. 577, 147 Pac. 582.

4. Madary v. Fresno, 20 Cal. App. 91, 128 Pac. 340. In an action of tort a defendant who answered and against whom judgment was rendered cannot complain of the omission to enter a judgment by default against his codefendant for failure to plead after the overruling of his demurrer; Golden Gate Mill & Mining Co. v. Joshua Hendy Mach. Co., 82 Cal. 184, 23 Pac. 45.

5. Estate of Friedman, 178 Cal. 28, 172 Pac. 140 (alleged heirs properly found not to be of kin of deceased cannot urge error in a decree in a proceeding under Code Civ. Proc., § 1664, in favor of other claimants or the evidence in support thereof; Estate of Hughson, 173 Cal. 448, 160 Pac. 548; Estate of Walden, 168 Cal. 759, 145 Pac. 100; Estate of Fleming, 162 Cal. 524, 123 Pac. 284; Estate of Walker, 148 Cal. 162, 82 Pac. 770; Estate of Piper, 147 Cal. 606, 82 Pac. 246; Estate of Blythe, 110 Cal. 231, 42 Pac. 643. See supra, § 59.

6. People ex rel. Bledsoe v. Campbell, 138 Cal. 11, 70 Pac. 918; People ex rel. Hardacre v. Rea, 2 Cal. App. 109, 83 Pac. 165.

7. See supra, § 493.

service of process on parties other than himself.[8] It also precludes his complaining of defects in the complaint affecting only a codefendant who does not appeal,[9] or of a failure to serve copies of pleadings on such codefendant.[10] An appellant cannot complain of an omission to make a separate finding upon an issue made by the separate answer of a codefendant in whose favor judgment is rendered and who does not appeal.[11] A surety who does not join in a plea of setoff interposed by his principal cannot be heard on appeal in relation to the defense, the principal not appealing.[12] An intervener is not entitled to complain that the judgment for the plaintiff is ineffectual or imperfect in its relation to other parties.[13] And when a demurrer to a complaint in intervention is properly sustained, the intervener ceases to have any further interest in the proceedings and cannot object to the sufficiency of the findings and judgment declaring the rights of the other parties.[14]

§ 495. Estoppel or Waiver of Right to Allege Error.— An appellant will not be heard to urge as grounds for reversal, errors which he is for some reason estopped from raising,[15] or which he has waived by a failure to take proper objection and exception in the trial court when

8. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Pacific Mutual Life Ins. Co. v. Hansen, 30 Cal. App. Dec. 652, 186 Pac. 616 (a defendant appellant appearing voluntarily cannot object to defects in the service upon his codefendants who do not appeal).

9. Ball v. Nichols, 73 Cal. 193, 14 Pac. 831.

10. McGary v. De Pedrorena, 58 Cal. 91 (distinguished in Thompson v. Johnson, 60 Cal. 292, 295).

11. Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323.

12. Home Security Bldg. & Loan Assn. v. George, 57 Cal. 363.

13. Gray v. Bonnell, 19 Cal. App. 243, 125 Pac. 355.

14. Moran v. Bonynge, 157 Cal. 295, 107 Pac. 312.

15. San Francisco v. Spring Valley Water Works, 1 Cal. Unrep. 783, holding an appellant who has had the benefit of a favorable ruling upon a statement in his brief cannot on the subsequent appeal have the benefit of the ruling while repudiating the existence of the fact upon which the ruling was based.

necessary,[16] by his subsequent conduct,[17] by stipulation,[18] or otherwise.[19] Thus, an objection to the allowance of an amendment to a pleading is waived by pleading over.[20] A party does not waive his demurrer[1] or motion[2] by submitting it without argument, as the objection is not taken by the argument, but by the demurrer or motion. Whether a failure to appear and prosecute a motion is an abandonment of it is uncertain. It has been so held,[3] but it may be that, under the rules of court, the absence of the party has only the effect of waiving his right to argument.[4] Where an objection to offered evidence is sustained and thereafter the objecting party withdraws his objection and offers to allow the party to recall his witnesses and produce the testimony, the party offering the evidence waives his right to complain if he does not avail himself of the privilege of introducing his testimony.[5]

16. See supra, §§ 74–93, inclusive, as to necessity of objection. But the failure to object to the rendition of judgment upon a report of a referee in the court below is not a waiver of the right to have exceptions to the report reviewed on appeal. Headley v. Reed, 2 Cal. 322.

17. See cases cited infra, this section; and see infra, § 498, as to acquiescence in error.

18. Hihn v. Courtis, 31 Cal. 398 (on rehearing); Glotzback v. Foster, 11 Cal. 37; Cahoon v. Levy, 10 Cal. 216 (by stipulating to submit an appeal upon certain named grounds, counsel waives other assignments of error and cannot insist upon them).

19. Estate of Learned, 70 Cal. 140, 11 Pac. 587 (holding an appellant cannot object to want of formal proof of a matter where on the trial he stated he was satisfied with counsel's unsworn statement); Rhode v. Dock-Hop Co., 30 Cal. App. Dec. 343.

20. Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132.

1. Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939.

2. Carder v. Baxter, 28 Cal. 99 (a refusal to argue a motion for new trial is not such an abandonment of the motion as precludes the party from urging error in the ruling thereon).

3. People v. Center, 61 Cal. 191, 9 Pac. Coast. L. J. 765; Frank v. Doane, 15 Cal. 302; Mahoney v. Wilson, 15 Cal. 42.

4. Chabot v. Tucker, 39 Cal. 434; Green v. Doane, 1 Cal. Unrep. 86.

5. Estate of Ross, 171 Cal. 64, 151 Pac. 1138; Coos Bay Mfg. Co. v. California Selling Co., 29 Cal. App. 407, 155 Pac. 817.

As to findings.—A party cannot complain of the correctness of a finding in accord with the allegations of his verified pleading,[6] or with the provisions of a stipulation into which he entered.[7] It is not permissible for an appellant to frame his pleading and try a case upon one state of facts and then on appeal ask a reversal upon a state of facts contradictory thereto.[8] And one who stipulates to a waiver of findings other than those filed upon the rendition of an interlocutory decree cannot complain that the findings are not sufficiently full.[9]

§ 496. Errors Committed or Invited by Appellant.—Parties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they had committed or invited. One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.[10]

6. McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355; Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337; Eaton v. Rocca, 75 Cal. 93, 16 Pac. 529; Riverside Land & Irrigation Co. v. Jensen, 73 Cal. 550, 15 Pac. 131.

7. Turpen v. Turlock Irrigation Dist., 141 Cal. 1, 74 Pac. 295.

8. Eaton v. Rocca, 75 Cal. 93, 16 Pac. 529.

9. Houghton v. Trumbo, 103 Cal. 239, 37 Pac. 152.

10. Simas v. Conselho Supremo, 60 Cal. Dec. 685, 194 Pac. 1001 (a plaintiff who opposed an interpleader cannot complain of a failure to make a deposit in court pursuant to Code Civ. Proc., § 386); McGuire v. Miller & Lux, 178 Cal. 644, 174 Pac. 898; Filippini v. Hewlett, 162 Cal. 111, 121 Pac. 376 (uncertainty in judgment); Seale v. Carr, 155 Cal. 577, 102 Pac. 262 (error as to allowance of attorney's fees); McCabe v. Goodwin, 106 Cal. 486, 39 Pac. 941 (in an action to determine the right to purchase swamp-land the plaintiff who joined a purchaser as defendant cannot question the power of the court to determine his rights); Brewster v. Bours, 8 Cal. 501 (a failure to frame special issues cannot be complained of by a party whose action caused such failure); Merrill v. Kohlberg, 29 Cal. App. 382, 155 Pac. 824; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719 (an appellant cannot complain of depositions introduced in the record on his motion); Southern Pacific Co. v. Hall, 100 Fed. 760, 41 C. C. A. 50.

Application of rule.—For example, one who requests the sustaining[11] or overruling[12] of a demurrer, or who requests any other order,[13] is estopped from asserting that the order is erroneous. An appellant who has treated a question as an issue in a case will not upon appeal be heard to say that instructions[14] or findings[15] thereon are erroneous as outside the issues. An appellant cannot on appeal complain of an interpretation of an instrument in his pleading.[16] A defendant who prevents a plaintiff from curing a defect of parties cannot object to the nonjoinder on appeal.[17] So, also, a defendant who prevents the plaintiff from proving a part of his case is precluded from urging on appeal the insufficiency of the plaintiff's evidence to sustain findings in his favor.[18] For like reason, where a judgment is reversed at the instance of one of several coparties, and the appellant causes the judgment to be vacated by the trial court, he cannot complain that the coparties not appealing take part in the

11. A defendant who requested that a demurrer to his counterclaim be sustained cannot complain of the ruling. Scatena v. California Cannery Co., 115 Cal. 14, 46 Pac. 737.

12. Coryell v. Cain, 16 Cal. 568; Haley v. Nunan, 2 Cal. Unrep. 189.

13. In re Radovich, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466; Fulton v. Cox, 40 Cal. 101; Steinberg v. Jacobs, 21 Cal. App. 765, 132 Pac. 1060.

14. Lee v. Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765 (holding that an instruction as to reckless and wanton acts on the part of a defendant cannot be objected to by him as outside the issues where the jury was instructed on the same subject at his request); Charves v. San Francisco-Oakland Terminal Rys., 30 Cal. App. Dec. 477, 186 Pac. 154. See supra, § 69.

15. Cross v. Bouck, 175 Cal. 253, 165 Pac. 702; Smith v. Peters, 31 Cal. App. Dec. 400, 188 Pac. 811; Berry v. Bank of Bakersfield, 24 Cal. App. Dec. 703. See supra, §§ 69–73, inclusive.

16. McPherson v. Great Western Milling Co., 30 Cal. App. Dec. 669, 186 Pac. 803.

17. Fulton v. Cox, 40 Cal. 101.

18. Harp v. Harp, 136 Cal. 421, 69 Pac. 28. Compare Merzoian v. Kludjian, 60 Cal. Dec. 135, 191 Pac. 673, holding there was no estoppel where the objection of the defendant was that the testimony offered was proper rebuttal testimony, and the plaintiff made no effort afterwards to introduce the evidence.

new trial,[19] or that the trial court corrected its judgment as to such coparties.[20]

§ 497. Invited Error as to Evidence and Instructions.—An appellant cannot object to the admission of incompetent evidence which he offered or brought out,[1] or whose withdrawal he objected to, or which he prevented from being withdrawn.[2] And if he introduces or calls out improper evidence, he is precluded from objecting to evidence of like character introduced by his adversary.[3] While one error cannot be held to offset another, a party introducing improper evidence may well be estopped to complain of the court's permitting the introduction of evidence of the other party by way of rebuttal.[4]

As to instructions.—An appellant cannot allege error in the giving of instructions requested by him,[5] unless the

19. Pfister v. Wade, 69 Cal. 133, 10 Pac. 369.

20. Kent v. San Francisco Sav. Union, 130 Cal. 401, 62 Pac. 620.

1. Gjurich v. Fieg, 164 Cal. 429, Ann. Cas. 1916B, 111, 129 Pac. 464, 466; Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27; Pabst Brew. Co. v. E. Clemens Horst Co., 264 Fed. 909.

2. Western States Gas & Elec. Co. v. Bayside Lumber Co., 59 Cal. Dec. 141, 187 Pac. 735; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733 (the fact that some little time intervened between the denial of the motion of the defendant to strike out the testimony and the offer of the plaintiff to withdraw it does not affect the application of the rule); Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164; Mitchell v. Davis, 23 Cal. 381.

3. Clark v. Fowler, 57 Cal. 142; Fernandez v. Western Fuse & Explosives Co., 34 Cal. App. 420, 167 Pac. 900 (quoting Washington Township etc. Co. v. McCormick, 19 Ind. App. 663, 667, 49 N. E. 1085, 1086; Myers v. Oceanside, 7 Cal. App. 87, 93 Pac. 686.

4. Myers v. Oceanside, 7 Cal. App. 87, 93 Pac. 686.

5. Walsh v. Standart, 174 Cal. 807, 164 Pac. 795; Gray v. Ellis, 164 Cal. 481, 129 Pac. 791; Cahill v. Baird, 138 Cal. 691, 72 Pac. 342; Wall v. Marshutz & Cantrell, 138 Cal. 522, 71 Pac. 692 (it is not material that contradictory instructions were given at the request of the appellant); Baker v. Borello, 131 Cal. 615, 63 Pac. 914; Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Dennison v. Chapman, 105 Cal. 447, 39 Pac. 61; Sierra Union Water & Mining Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128. See infra,

trial judge imported into them some new and distinct error prejudicial to him.[6] A judgment will not be reversed for contradictory instructions where those favorable to the appellant and given at his request are erroneous,[7] but this rule does not apply where the instructions given by the appellant are correct.[8] An appellant cannot complain of a refusal of the court to direct the jury to disregard a part of his case.[9]

§ 498. Error Consented to or Acquiesced in.—One cannot appeal from a judgment or order consented to by him,[10] and cannot upon an appeal properly taken complain of rulings assented to or acquiesced in by him.[11] The

§ 509. The appellate court is bound to assume the correctness of instructions given at the appellant's request. Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200.

6. Baker v. Borello, 131 Cal. 615, 63 Pac. 914.

7. Dennison v. Chapman, 105 Cal. 447, 39 Pac. 61. See infra, § 611.

8. Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292.

9. Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755; Southern Pacific Co. v. Hall, 100 Fed. 760, 41 C. C. A. 50.

10. See supra, § 62.

11. Ackerman v. Schultz, 178 Cal. 190, 172 Pac. 609 (by waiving his right to demur to a cross-complaint and agreeing that his answer to the complaint be treated as an answer to the cross-complaint, the plaintiff is precluded from questioning the propriety of a cross-complaint in the action); Baker v. Eilers Music Co., 175 Cal. 652, 166 Pac. 1006 (where a judgment-roll is excluded from evidence on a statement of counsel for the adverse party that an appeal was pending, the appellant who merely excepted cannot urge the ruling was erroneous because there was no proof of the pendency of the appeal); Realty Bonds & Finance Co. v. Point Richmond Canal & L. Co., 171 Cal. 238, 152 Pac. 433 (an appellant cannot complain of the submission of a special issue to the jury when he consented thereto); Seale v. Carr, 155 Cal. 577, 102 Pac. 262; Estate of Johnson, 152 Cal. 778, 93 Pac. 1015; County of Placer v. Freeman, 149 Cal. 738, 87 Pac. 628; Estate of Lorenz, 124 Cal. 495, 57 Pac. 381; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Erlanger v. Southern Pacific R. Co., 109 Cal. 395, 42 Pac. 31; Conniff v. Kahn, 54 Cal. 283 (order overruling a demurrer); Wilson v. Dougherty, 45 Cal. 34; Thompson v. Connolly, 43 Cal. 636; San Francisco v. Certain Real Estate, 42 Cal. 513; Mecham v. McKay, 37 Cal. 154; Hathaway v. Brady, 23 Cal. 121 (after remitting a portion of his recovery under an order of court, a plaintiff cannot complain that he was entitled to the full amount of the verdict; Coryell

theory upon which these cases proceed is that by consenting to the judgment or order, the party has expressly waived or abandoned all objection, opposition or exception to it, and therefore he should not afterwards be allowed, on appeal, to question its propriety.[12]

One who does not stand upon his pleading when a demurrer to it is sustained, but takes some action indicating an acquiescence in the ruling, cannot complain of it.[1] So, also, a party filing a special demurrer waives

v. Cain, 16 Cal. 567 (order overruling a demurrer entered by consent); Holmes v. Rogers, 13 Cal. 191; Brotherton v. Hart, 11 Cal. 405 (where the parties consented to the denial of a motion for new trial); Meerholz v. Sessions, 9 Cal. 277; Treadwell v. Wells, 4 Cal. 260 (informalities in a verdict received and recorded by consent will not be considered on appeal); Lampton v. Davis Standard Bread Co., 32 Cal. App. Dec. 514, 191 Pac. 710; Imperial Development Co. v. City of Calexico, 32 Cal. App. Dec. 376, 191 Pac. 50 (a respondent consenting that a bill of exceptions be made a part of the record cannot object to a consideration of the bill because not presented in time); Petersen v. Holder, 31 Cal. App. Dec. 22, 187 Pac. 99; United States Film Co. v. United States Fidelity & Guaranty Co., 30 Cal. App. Dec. 480, 186 Pac. 364; Rosenthal v. Silveira, 29 Cal. App. Dec. 528, 184 Pac. 58 (where the substance of a deed is read in evidence, and its existence and the fact of its execution were considered before the court by all parties, the parties are estopped from objecting that the deed was not formally introduced in evidence); Conlin v. Southern Pacific R. R. Co., 40 Cal. App. 743, 182 Pac. 71; Berkeley Bank of Savings & Trust Co. v. Miller, 23 Cal. App. 315, 137 Pac. 1101; Grunsky v. Field, 1 Cal. App. 623, 82 Pac. 979 (acquiescence in error takes away the right of objecting to it). See infra, § 501, as to presumption of consent.

12. Mecham v. McKay, 37 Cal. 154.

1. A party waives any error in an order sustaining a demurrer to his pleading by filing an amended pleading. Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 Pac. 339; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; Madden v. Occidental & Oriental S. S. Co., 86 Cal. 445, 25 Pac. 5; Gale v. Tuolumne Water Co., 14 Cal. 25. A party desiring to test the question as to the correctness of a judgment sustaining a demurrer should leave the pleadings where the judgment leaves them. Gale v. Tuolumne Water Co., 14 Cal. 25.

A plaintiff who voluntarily dismisses his action upon the sustaining of a demurrer to his complaint is deemed to have acquiesced in the ruling and cannot urge it as error; Home Real Estate Co. v. Winnants, 39 Cal. App. 643, 179 Pac. 534.

the objections raised by consenting that it be overruled.[3] But this rule is not applicable to a general demurrer. A failure of the complaint to state a cause of action is not waived even by a failure to demur, and it is obvious that this objection is not waived by consenting that it be overruled.[3]

However, under the California practice, a defendant by pleading over after an adverse decision on his demurrer is not deemed to have withdrawn his demurrer and to have acquiesced in the ruling, so as to preclude him from afterwards urging the error as a ground for reversal.[4] And where testimony outside the issue is erroneously admitted in evidence over objection, the fact that the defendant in rebuttal introduced some evidence of the same general character as that objected to does not estop him from urging the objection. This is not invited error. Neither does it fall within the rule that a party who calls out evidence thus precludes himself from objecting to evidence of like character introduced by his adversary. It follows that the objection is not waived.[5]

A failure to object is not necessarily a consent to the proceedings so as to preclude a party from urging error in them on appeal,[6] nor does a concession by the appel-

2. Evans v. Gerken, 105 Cal. 311, 38 Pac. 725; Conniff v. Kahn, 54 Cal. 283; Coryell v. Cain, 16 Cal. 567; Haley v. Nunan, 2 Cal. Unrep. 189; Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73; Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700.

3. Evans v. Gerken, 105 Cal. 311, 38 Pac. 725; Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934; Jones v. Los Angeles & P. Ry. Co., 4 Cal. Unrep. 755, 37 Pac. 656. See supra, § 78, as to necessity of objection.

4. Curtiss v. Bachman, 84 Cal. 216, 24 Pac. 379; Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

5. After the court had held over appellant's objection that the evidence was competent and had permitted the respondent, who had the burden, to introduce such evidence, the appellant in seeking to overcome the case made by the respondent could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action. Fernandez v. Western Fuse & Explosives Co., 34 Cal. App. 420, 167 Pac. 900.

6. Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849.

lant in his brief that a certain amount is due the respondent make the judgment appealed from to that extent a consent judgment or affect the jurisdiction of the court.[7]

III. PRESUMPTIONS.

General Principles.

§ 499. Rule Stated.—An appellate court will never indulge in presumptions to defeat a judgment.[8] It will never presume that an error was committed, or that something was done or omitted to be done which constitutes error.[9] On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts.[10] It is the duty of a

7. Morgan v. San Diego County, 3 Cal. App. 454, 86 Pac. 720.

8. Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549; Williams v. Reed, 30 Cal. App. Dec. 89, 185 Pac. 515.

9. Bacon v. Grosse, 165 Cal. 481, 132 Pac. 1027; Estate of Kilborn, 158 Cal. 593, 112 Pac. 52; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Horwege v. Sage, 137 Cal. 539, 70 Pac. 621; Newman v. Overland Pacific Ry. Co., 132 Cal. 73, 64 Pac. 110; Reed v. Johnson, 127 Cal. 538, 59 Pac. 986; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970; Mulcahy v. Glazier, 51 Cal. 626; Brown v. Kentfield, 50 Cal. 129; Brady v. O'Brien, 23 Cal. 244; Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023; Schwartz v. Royal Neighbors of America, 12 Cal. App. 595, 108 Pac. 51; San Domingo Gold Min. Co. v. Grand Pacific Gold Min. Co., 10 Cal. App. 415, 102 Pac. 548; Leonhart v. California Wine Assn., 5 Cal. App. 19, 89 Pac. 847; Rose v. Doe, 4 Cal. App. 680, 89 Pac. 135.

10. Rolland v. Porterfield, 60 Cal. Dec. 159, 191 Pac. 913; Throop v. Weaver, 180 Cal. 335, 181 Pac. 55 (it will be presumed that the note described in the judgment is the one in regard to which the parties litigated); Bryant v. Gray, 179 Cal. 679, 178 Pac. 709; Estate of Plumb, 177 Cal. 300, 170 Pac. 609; Taylor v. Avila, 175 Cal. 203, 165 Pac. 533 (assuming that the trial court may have indulged in a presumption that a use of land was under a claim of right and adverse); San Pedro, L. A. & S. L. R. R. Co. v. City of Long Beach, 172 Cal. 631, 158 Pac. 204 (presumed that trial

litigant complaining of errors committed by a trial court to produce a duly authenticated record affirmatively showing the alleged error. If it is necessary to convict

court drew inferences arising from the evidence or want of evidence against the plaintiff); Estate of Parsons, 159 Cal. 425, 114 Pac. 570; Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080 (presumption that person not served with notice of appeal from order denying new trial was not party to motion); Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870; Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 Pac. 1050; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501; Freman v. Marshall, 137 Cal. 159, 69 Pac. 986; Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257 (appeal from order refusing to set aside default); Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57; Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524; McLennan v. Wilcox, 126 Cal. 51, 58 Pac. 305; Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Butler v. Soule, 124 Cal. 69, 56 Pac. 601; Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Estate of Yoakam, 103 Cal. 503, 37 Pac. 485: Lynn v. Southern Pacific Co., 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018; Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005; De Pedrorena v. Hotchkiss, 95 Cal. 638, 30 Pac. 787; Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811 (the presumption is, that the judgment is correct until proved otherwise; and the burden of overcoming this presumption is upon the appellant); Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026; Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754; Mahan v. Wood, 79 Cal. 258, 21 Pac. 757; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Strathern v. Dakin, 63 Cal. 478; Savage v. Sweeney, 63 Cal. 340; Los Angeles County Bank v. Raynor, 61 Cal. 145; Meredith v. Santa Clara Min. Assn., 60 Cal. 617; Parker v. Altschul, 60 Cal. 380; Wilson v. Dougherty, 45 Cal. 34; Todd v. Winants, 36 Cal. 129; Moyes v. Griffith, 35 Cal. 556; Hastings v, Cunningham, 35 Cal. 549; Abadie v. Carrillo, 32 Cal. 172; Baker v. Joseph, 16 Cal. 173; McDonald v. Bear River & Auburn W. & Min. Co., 13 Cal. 220; Grangers' Union v. Ashe, 12 Cal. App. 143, 106 Pac. 889; White v. Abernathy, Clark & Co., 3 Cal. 426; Gardner v. Stare, 6 Cal. Unrep. 945, 69 Pac. 426; Petersen v. Taylor, 4 Cal. Unrep. 335, 34 Pac. 724; Fowler v. Heinrath, 2 Cal. Unrep. 249, 2 Pac. 248 (order dissolving injunction); Brown v. Vidal, 1 Cal. Unrep. 15; Murdock v. Murdock, 33 Cal. App. Dec. 489,

the court of error to rely upon any matters dehors the record, the appellant must embody it in a bill of exceptions or some substitute therefor.[11] If he does not do

194 Pac. 762; People v. Arcega, 33 Cal. App. Dec. 129, 193 Pac. 268 (as a proceeding under Red-light Abatement Act is a civil action, the rules as to presumptions in civil actions generally apply); Gould v. Crawford, 32 Cal. App. Dec. 720, 192 Pac. 88; Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023; Boyer v. City of Long Beach, 32 Cal. App. Dec. 301, 191 Pac. 35 (proceedings on motion to dismiss); United States Film Co. v. United States Fidelity & Guar. Co., 30 Cal. App. Dec. 480, 186 Pac. 364; Simpson v. Smith, 29 Cal. App. Dec. 704, 184 Pac. 507; Matiasick v. Pacific Electric Ry. Co., 31 Cal. App. Dec. 4, 187 Pac. 461; United States Film Co. v. United States Fidelity & Guaranty Co., 30 Cal. App. Dec. 480, 186 Pac. 364; Sledge v. Stolz, 41 Cal. App. 209, 182 Pac. 340; Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906; Curtin v. Black Oak Development Co., 35 Cal. App. 1, 168 Pac. 1157; Hughes v. Chung Sun Tung Co., 28 Cal. App. 371, 154 Pac. 299, 301 (where the court vacated a nonsuit under section 473 of the Code of Civil Procedure); Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548; Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690; Wiencke v. Bibby, 15 Cal. App. 50, 113 Pac. 876 (order setting aside appointment of receiver); Continental Bldg. & Loan Assn. v. Woolf, 12 Cal. App. 725, 108 Pac. 729 (where judgment is entered upon stipulation, it will be presumed, if necessary, that the stipulation was made a matter of minute entry, and was sufficiently full and specific to authorize the entry of the judgment); Fisher v. Frank, 8 Cal. App. 472, 97 Pac. 95; Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128; Leonhart v. California Wine Assn., 5 Cal. App. 19, 89 Pac. 847; Miller v. Griffith, 4 Cal. App. 341, 88 Pac. 285; Hayden v. Consolidated Min. & D. Co., 3 Cal. App. 136, 84 Pac. 422.

11. Hamilton v. San Francisco N. & C. Ry., 32 Cal. App. Dec. 1033, 192 Pac. 323; Service v. Bedros, 180 Cal. 519, 182 Pac. 26; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Smith v. Davis, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26; Estate of Arguello, 85 Cal. 151, 24 Pac. 641; Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Blum v. Sunol, 63 Cal. 341; Mulcahy v. Glazier, 51 Cal. 626; Ferrer v. Mutual Ins. Co., 47 Cal. 416; Clarke v. Huber, 25 Cal. 593; Baker v. Joseph, 16 Cal. 173; McDonald v. Bear River & Auburn W. & Min. Co., 13 Cal. 220; White v. Abernathy, Clark & Co., 3 Cal. 426; Sirkus v. Central R. Co., 3 Cal. Unrep. 535, 30 Pac. 790; United States Film Co. v. United States Fidelity & Guaranty Co., 30 Cal. App. Dec. 480, 186 Pac. 364; Myers v. Canepa,

so, or does not include in the bill of exceptions everything necessary to show that the action of the trial court was erroneous, and if there are any matters which could have been presented to the court below which would have authorized the judgment or order complained of, it will be presumed that such matters were presented.[12] In a case where there are two presumptions equally reasonable arising upon the face of the record, that which will sustain the judgment will be adopted.[13]

§ 500. Limitations on Power to Indulge Presumptions.— There is a well-defined limit to an appellate tribunal's power to indulge in presumptions in support of the orders or judgments of a court. It can indulge in no presumption which does violence to the facts as presented by the record of an inferior court.[14] Whenever the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact or that the fact was otherwise than is averred.[15] So, also, a bill of exceptions is presumed to contain all the evidence material to rulings excepted to, and it cannot

37 Cal. App. 556, 174 Pac. 903, 906; Solomon v. Justices' Court, 36 Cal. App. 152, 171 Pac. 817; Mintzer v. City of Richmond, 27 Cal. App. 566, 150 Pac. 799; Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128; Nemo v. Farrington, 7 Cal. App. 443, 94 Pac. 874, 877; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; First Nat. Bank v. Kowalsky, 3 Cal. Unrep. 759, 31 Pac. 1133; Grunsky v. Field, 1 Cal. App. 623, 82 Pac. 979; Boyer v. Pacific Mutual Life Ins. Co., 1 Cal. App. 54, 81 Pac. 671.

12. Bryant v. Gray, 179 Cal. 679, 178 Pac. 709; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; Mulcahy v. Glazier, 51 Cal. 626; Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906; Continental Bldg. & Loan Assn. v. Woolf, 12 Cal. App. 725, 108 Pac. 729.

13. Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 Pac. 339; Whipley v. Flower, 6 Cal. 630.

14. Johnston v. Southern Pacific Co., 150 Cal. 535, 89 Pac. 348; Hastings v. Cunningham, 39 Cal. 137 (no presumption as to a mistake in dates can be indulged); Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Seaver v. Cay, 9 Cal. 564.

15. Johnston v. Southern Pacific Co., 150 Cal. 535, 89 Pac. 348; Pearson v. Pearson, 46 Cal. 609.

be presumed that an error appearing therein was cured by matters not contained in the bill.[16] As stated in an early case, "Legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent, it will be presumed that what ought to have been done was not only done, but rightly done; but when the record states what was done, it will not be presumed that something different was done."[17]

Effect of papers not properly in record.—Papers which are not properly a part of the record are not entitled to consideration even though included in the transcript, and do not preclude a court of review from indulging presumptions in aid of the action of a trial court.[18]

Presumption against stipulated facts.—The office of presumptions is to supply the absence of facts, not to overthrow admitted facts. And when findings are waived because the facts are stipulated, the stipulated facts become part of the judgment-roll and the findings upon which the judgment rests. Consequently, no presumptions can be indulged on appeal against any stipulated fact.[19]

Application of Rule.

§ 501. Application in General.—The rule of presumptions on appeal has been frequently applied by appellate courts. When the record upon appeal is so imperfect that a court of review cannot ascertain therefrom whether or not the rulings of a trial court were erroneous, it will be presumed they were correct.[20] If no exception to a

16. See infra, § 526.

17. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742 (per Sanderson, J.).

18. Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970; De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787.

19. Conway v. Supreme Council, 137 Cal. 384, 70 Pac. 223.

20. Knowles v. Calderwood, 1 Cal. Unrep. 80.

ruling of court appears in the record, it must be presumed that no exception was taken.[1] In the absence of any record showing that the appellant objected to a ruling of a trial court or to an irregular method of procedure it must be assumed on appeal that he consented thereto, in which case, conceding that without such consent the court erred, the appellant is in no position to complain.[2]

If there is nothing in the record to the contrary, it will be presumed that an undertaking on attachment was in due form,[3] that a receiver was regularly appointed,[4] and that a lost record was properly supplied.[5] Where one of several coparties appeals from a judgment against them, the appellate court is bound to presume that there was no error as to the parties not appealing.[6] Likewise, if there is nothing in the record to the contrary, where the trial of an action took place more than five years after the filing of the answer, it will be presumed that the trial court had before it a stipulation extending time and authorizing the proceeding taken.[7] And it may even be presumed that the trial court disregarded its rules for sufficient cause and to subserve the ends of justice.[8]

1. Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Malone v. Beardsley, 92 Cal. 150, 28 Pac. 218; Dieckmann v. Merkh, 20 Cal. App. 655, 130 Pac. 27.

2. Estate of Robinson, 142 Cal. 152, 75 Pac. 777; Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888; Hitchcock v. Caruthers, 82 Cal. 523, 23 Pac. 48 (where a case was tried with less than twelve jurors); Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711 (where an action on a note was tried before a jury upon special issues, and the court after argument found other facts); Parker v. Altschul, 60 Cal. 380; Wilson v. Dougherty, 45 Cal. 34; United States Film Co. v. United States Fidelity & Guaranty Co., 30 Cal. App. Dec. 480, 186 Pac. 364. See supra, § 498.

3. La Dow v. National Bldg. & Pav. Brick Co., 11 Cal. App. 308, 104 Pac. 838.

4. O'Neil v. McLennan, 7 Cal. Unrep. 161, 73 Pac. 576.

5. Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

6. Ricketson v. Richardson, 26 Cal. 149.

7. Richmond v. Julian Consolidated Min. Co., 176 Cal. 600, 169 Pac. 356.

8. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769.

Exercise of discretion.—When a matter rests within the discretion of a trial court, it will be presumed, unless the contrary is made to appear, that the trial court properly exercised its discretion.[9] And the burden in all cases is upon the appellant to make it appear that the discretion reposing in the court was abused.[10]

Application to probate courts.—When the probate court has jurisdiction of the subject matter, all intendments are in favor of the correctness of the action of the court, the same as other courts of record.[11]

§ 502. Jurisdiction, Venue and Organization of Court.—When, on an appeal from a judgment of a superior court rendered after appearance of the defendant, the record is silent with reference to the jurisdiction of a superior

9. Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617; Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511; Miller v. Highland Ditch Co., 91 Cal. 103, 27 Pac. 536; Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; Barnhart v. Kron, 88 Cal. 447, 26 Pac. 210; Byrne v. Reed, 75 Cal. 277, 17 Pac. 201; Hitchcock v. McElrath, 69 Cal. 634, 11 Pac. 487; Williams v. Reed, 30 Cal. App. Dec. 89, 185 Pac. 515; Ulm v. Prather, 29 Cal. App. 92, 154 Pac. 611 (order appointing receiver under Code Civ. Proc., § 564); Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93; McConnell v. Fox, 2 Cal. App. 329, 83 Pac. 259. See infra, §§ 527–538, inclusive, as to review of exercise of discretion.

10. Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557 (discretion as to time within which answer or demurrer shall be filed to an amended pleading); Sirkus v. Central R. Co., 3 Cal. Unrep. 535, 30 Pac. 790.

11. Estate of Bump, 152 Cal. 271, 92 Pac. 642 (presumption as to proper exercise of power of probate court to award costs in probate proceedings); Brodribb v. Tibbits, 63 Cal. 80 (presumed that order removing guardian was made upon notice); Lucas v. Todd, 28 Cal. 182; Estate of McPhee, 10 Cal. App. 162, 101 Pac. 530 (order requiring personal representative to give further security and revoking his letters); Estate of Bouysson, 3 Cal. App. 39, 84 Pac. 460 (presumption in favor of order vacating appointment of administrator).

On an appeal from a decree of distribution, the jurisdiction of the probate court will be presumed when all the parties interested are before the court, and the jurisdiction is assumed by them. Estate of Apple, 66 Cal. 432, 6 Pac. 7.

court over the subject matter and of the person of the defendant, it will be presumed that the trial court ascertained that it had jurisdiction before rendering judgment. A contrary assumption would involve a presumption that the court failed to do its duty, and such a presumption is never indulged.[12] If, however, the record discloses a recital in the judgment or judgment-roll, that jurisdiction has been acquired, or facts from which jurisdiction may be inferred, there is no occasion for any presumption,[13] or at least it will be presumed that the recitals are true.[14]

A different rule prevails when the judgment is rendered after a default of the defendant. Upon a direct attack upon such a judgment by appeal, there is no presumption that the court had jurisdiction over the person of the defendant. Unless the record in some way discloses the acquisition of jurisdiction over the defendant, the judgment will be reversed.[15] While, in such case, there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over

12. Estate of Apple, 66 Cal. 432, 6 Pac. 7; Hoyt v. Stearns, 39 Cal. 92 (presuming amount of demand was less than three hundred dollars when the action was commenced before a justice of the peace); Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 891.

13. Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 891 (the presumption that the court has jurisdiction arises only where the record is silent).

14. Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026 (a recital as to the appearance of the defendant is presumed to be true).

Where a judgment contains a recital that legal process was duly served, and service by publication would not warrant the judgment rendered, it will be presumed the defendant was personally served. Bank of Commerce & Trust Co. v. Kenney, 175 Cal. 59, 165 Pac. 8 (judgment quieting title).

15. Sichler v. Look, 93 Cal. 600, 29 Pac. 220 (in this case the court said: "Upon a direct attack, there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant." Referring to this statement the court, in Eichhoff v. Eichhoff, 107 Cal. 42, 48 Am. St. Rep. 110, 40 Pac. 24, said: "The phrase 'direct attack' in the above quotation evidently refers to appeals from the judgment"); McMinn v. Whelan, 27 Cal. 300; Schloss v. White, 16 Cal. 65.

the defendant, yet, in all matters of which the judgment contains a recital, its verity, in the absence of any contradictory evidence in a bill of exceptions, will be presumed as fully as upon a collateral attack. If such recital finds support in other portions of the record which under any condition of facts could exist, it will be presumed, in the absence of a contradictory showing, that such condition of facts existed.[16]

Organization of court.—When a judge of one county sits in another, in the absence of any showing to the contrary, it will be presumed on an appeal from an order made by him, that he was requested so to serve by the judge of the superior court of the latter county, or by the Governor, as provided in the constitution.[17]

Venue.—Where the complaint and the record are silent as to the place of residence of the defendant, it will be presumed upon an appeal from an order denying a motion by a defendant for a change of the place of trial, that he is a resident of the county wherein the action is commenced.[18]

§ 503. Grounds for Order.—Where the record does not show upon what grounds an order on a motion is made, the ruling must be presumed to have been correct,[19] and to have been made upon some good ground.[20] Where an

16. La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765; Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853.

Formerly, the code did not require the affidavit for the order of publication or the order to be contained in the judgment-roll. Under this state of the law, when the judgment recited that the defendant had been regularly summoned and the judgment-roll contained an affidavit of publication and of deposit of a copy of the summons, it would be presumed that service was made under a proper order of court made upon a sufficient affidavit. Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

17. In re Corralitos Co-operative Drying & Canning Co., 130 Cal. 570, 62 Pac. 1076.

18. Aisbett v. Paradise Mountain Min. & M. Co., 21 Cal. App. 267, 131 Pac. 330.

19. Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696; Dimick v. Campbell, 31 Cal. 238.

20. Woods v. Diepenbrock, 141 Cal. 55, 74 Pac. 546; Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730

order granting a motion to vacate a judgment is general in its terms and can be sustained upon any of the grounds stated in the motion, an appellate court is bound to assume that it was granted on that ground.[1] The same rule is applicable to an order granting a new trial.[2] And where a change of venue is denied and the grounds upon which the demand therefor was based do not appear in the record, it will be presumed that they were wholly insufficient,[3] or that the denial was put upon the ground that the defendant did not act with due diligence.[4]

§ 504. Parties and Process.—In the absence of anything in the record to the contrary, it will be presumed in support of a judgment that an order substituting parties was made on notice,[5] or upon the consent of the appellant.[6] So, also, unless it otherwise appears from the record, it will be presumed that the addition of a party after the filing of the complaint was made by leave of court.[7] In an action against a minor, it will be presumed on appeal upon the judgment-roll that the trial court regularly appointed a guardian ad litem who appeared and answered.[8]

Process.—When the proof of service of process consists of a written admission of the defendant, it will be presumed in favor of a judgment thereon that the genuine-

(order striking out pleading); Brown v. Vidal, 1 Cal. Unrep. 15 (order dismissing action); Whitney v. Northwestern Pac. R. R. Co., 39 Cal. App. 139, 178 Pac. 326; Winslow v. McCarthy, 39 Cal. App. 337, 178 Pac. 720 (order vacating judgment). See infra, § 524.

1. Winslow v. McCarthy, 39 Cal. App. 337, 178 Pac. 720.

2. See infra, § 524.

3. Union Lumber Co. v. Metropolis Const. Co., 13 Cal. App. 584, 110 Pac. 329.

4. Hart v. Forgeus, 60 Cal. Dec. 572, 193 Pac. 764.

5. Ford v. Bushard, 116 Cal. 273, 48 Pac. 119.

6. Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

7. Moyle v. Landers' Admrs., 83 Cal. 579, 23 Pac. 798 (addition of stockholder in a representative suit).

8. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

ness of the signature was proved.[9] And it has been held that where minor defendants were served by publication, it will be presumed, until the contrary is made to appear, that they were over the age of fourteen, and that no service on the parent or guardian was required.[10]

§ 505. Pleadings.—Where the record does not show what action was taken on a demurrer, it will be presumed that the demurrer was overruled,[11] or withdrawn or waived.[12] If the parties go to trial after an order overruling a special demurrer, it will be presumed upon an appeal upon the judgment-roll that the error was waived, or the trial was had by consent.[13] Where a complaint in intervention is not set out in the record, it will be presumed that a demurrer thereto was properly overruled.[14] And upon appeal upon the judgment-roll from a judgment entered for failure to answer after demurrer overruled, it will be presumed that notice of the ruling on the demurrer was given.[15] So, also, in the absence of a bill of exceptions showing upon what ground a pleading was stricken out, it will be presumed that the action of the court was proper.[16] When, however, an appeal is

9. Alderson v. Bell, 9 Cal. 315. See supra, § 502.

10. Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

11. Hoeft v. Supreme Lodge, Knights of Honor, 113 Cal. 91, 33 L. R. A. 174, 45 Pac. 185; Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064 (where demurrer was without merit, it will be presumed the trial court would have overruled it); Moran v. Abbey, 58 Cal. 163; Brooks v. Douglas, 32 Cal. 208; Abadie v. Carrillo, 32 Cal. 172; Murdough v. Murdough, 23 Cal. App. 179, 137 Pac. 267.

12. Moran v. Abbey, 58 Cal. 163; McCarthy v. Yale, 39 Cal. 585; Brooks v. Douglass, 32 Cal. 208.

13. Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906 (where it is contended the court erred in overruling a demurrer to a special defense, it will be presumed the defendant withdrew his defense from the jury, unless the record shows otherwise); Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 Pac. 339.

14. Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

15. Hooper v. Smith, 30 Cal. App. 460, 158 Pac. 556.

16. Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730.

taken from a judgment for the plaintiff on the pleadings, the defendant's denials must be taken as true.[17]

Sufficiency of complaint.—After verdict it will be presumed that facts imperfectly alleged have been proved, but it cannot presume that a material fact not at all stated has been proved.[18] Nothing, it has been said, is to be presumed after verdict but what is expressly stated in the declaration or what is necessarily implied from the facts which are stated.[19] It has been held, however, that an omission to allege the disallowance by an administrator of the claim sued on will be presumed to have been proved.[20] So, also, in support of findings not within the issues, it will be presumed, in a proper case in the absence of evidence, that the facts found were proved without objection.[1]

Defense of statute of limitations.—Upon an appeal from a judgment against a party who is entitled to interpose the defense of the bar of the statute of limitations, it will be presumed, in the absence of a showing in the record to the contrary, that the defense was waived.[2]

Amended and supplemental pleadings.—A recital in an amended or supplemental pleading that it was filed by leave of court will be accepted as a verity, in the absence of an affirmative showing in the record to the contrary.[3] And even where there is no such declaration, and there is no affirmative showing that it is not true, an appellate court will presume that an amended pleading was duly

17. Inyo County v. Given, 60 Cal. Dec. 131, 191 Pac. 688.

18. Barron v. Frink, 30 Cal. 486; Haynes v. Indio Levee District, 31 Cal. App. Dec. 693, 189 Pac. 475; California Canneries Co. v. Great Western Lumber Co., 30 Cal. App. Dec. 368, 185 Pac. 1008. See supra, § 78.

19. Barron v. Frink, 30 Cal. 486.

20. Hentsch v. Porter, 10 Cal. 555. See supra, § 79.

1. See infra, § 512.

2. Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848. See LIMITATION OF ACTIONS.

3. Roper v. McFadden, 48 Cal. 346; Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690.

filed, or filed with the trial court's permission.[4] So, also, where the contrary does not appear, it will be presumed that copies of such pleadings were served on the adverse parties,[5] or if they appeared by attorney, upon their attorneys,[6] and that evidence thereof was before the court when it made its decree.[7] An insufficient waiver of notice of all further proceedings does not overcome this presumption.[8] A refusal to allow an amendment will be presumed correct when the character of the amendment is not shown by the record.[9]

§ 506. Dismissal, Nonsuit and Directed Verdict.—Proceedings had upon motions to dismiss[10] and for a nonsuit[11] are within the rule of presumptions and will be presumed regular unless the record shows the contrary. On an appeal upon the judgment-roll alone, a dismissal

4. Dowling v. Comerford, 99 Cal. 204, 33 Pac. 853; Livermore v. Webb, 56 Cal. 489; Segerstrom v. Scott, 16 Cal. App. 256, 116 Pac. 690.

5. Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027 (distinguishing Thompson v. Johnson, 60 Cal. 292, on the ground that the order granting leave to amend limited the service to a single defendant, and therefore no presumption ought to lie that service had been made when the trial court had decided that it need not be made); Livermore v. Webb, 56 Cal. 489; Gould v. Crawford, 32 Cal. App. Dec. 720, 192 Pac. 88; Gaddis v. Grant, 39 Cal. App. 437, 179 Pac. 410.

6. Canadian & A. Mortgage & Trust Co. v. Clarita Land & I. Co., 140 Cal. 672, 74 Pac. 301 (where the record shows that a copy of the pleading was served on the party but does not show service upon the attorney, it will be presumed that service was made upon the attorney also).

7. Riverside County v. Stockman, 124 Cal. 222, 56 Pac. 1027; Gould v. Crawford, 32 Cal. App. Dec. 720, 192 Pac. 88.

8. Gould v. Crawford, 32 Cal. App. Dec. 720, 192 Pac. 88.

9. Jessup v. King, 4 Cal. 331.

10. Parker v. Altschul, 60 Cal. 380 (dismissal of party presumed to have been consented to); Boyer v. City of Long Beach, 32 Cal. App. Dec. 301, 191 Pac. 35; Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 Pac. 82 (dismissal of party presumed correct).

11. McGibbon v. Schmidt, 172 Cal. 70, 155 Pac. 460 (presuming order to be based upon a failure to prove breach of contract); Hanna v. DeGarmo, 140 Cal. 172, 73 Pac. 830 (where the record was silent as to a motion for nonsuit or an order thereon); Lutton v. Rau, 37 Cal. App. 429, 173 Pac. 1111.

will be presumed to have been ordered on some good ground and in conformity with the rules of law. If the record permits, a reasonable inference is that the dismissal was for failure to prosecute with due diligence.[12]

The presumption in favor of an order granting a nonsuit at the close of plaintiff's evidence is not very strong, however.[13] The evidence must be construed as strongly as possible the other way. The appellate court is bound to accept as proved every fact which the evidence tended to prove and which was essential to be proved to entitle the plaintiff to a recovery upon the cause of action stated in the complaint.[14] Not only this, but it is also its duty to resolve all reasonable inferences that may be drawn in favor of the plaintiff.[15] The same construction must be placed upon the statement of counsel when reviewing an order directing a verdict on an opening statement.[16] So, also, where a verdict is directed at the conclusion of all the evidence, every intendment is to be indulged in favor of the party against whom the verdict is directed.[17] There is no material difference between the rule governing the appellate court in considering the sufficiency of the evidence, where the trial court has directed a verdict, from that where a nonsuit is granted upon motion after the evidence of both parties is in.[18]

12. Woods v. Diepenbrock, 141 Cal. 55, 74 Pac. 546; Brown v. Vidal, 1 Cal. Unrep. 15.

13. Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057.

14. Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Dow v. Gould & Curry S. Min. Co., 31 Cal. 629 (citing Cravens v. Dewey, 13 Cal. 40); Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899. See Walker v. Southern Pacific Co., 38 Cal. App. 377, 176 Pac. 175, holding evidence must be given same construction when reviewing an order denying a nonsuit.

15. Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 Pac. 242; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Togni v. Taminelli, 11 Cal. App. 7, 103 Pac. 899.

16. Bias v. Reed, 169 Cal. 33, 145 Pac. 516.

17. King v. Hercules Powder Co., 39 Cal. App. 223, 178 Pac. 531.

18. Estate of Morey, 147 Cal. 495, 82 Pac. 57; King v. Hercules

Trial.

§ 507. Conduct of Trial.—If there is nothing in the record to the contrary, it will be presumed that the proceedings upon the trial of an action were regular. If both issues of fact and law are joined, it will be presumed upon appeal from a judgment upon the merits upon the judgment-roll that the issues of law were first disposed of.[19] Where a judgment recites that the cause was regularly heard before the court sitting without a jury, and it nowhere appears in the record that the appellant demanded a jury, it will be presumed that a jury was waived.[20] So, also, if a jury render a verdict as to special issues, and the court finds on the remaining issues and renders judgment on all such findings, it will be presumed that a jury had been expressly waived as to issues tried and determined by the court.[1] But where the court rejects the special findings of the jury and renders judgment inconsistent therewith, it will not be presumed that the jury was waived or that the party voluntarily relinquished the verdict returned. The action of the court in such case is in effect a vacation of the verdict, and after such an order the court cannot proceed and determine the cause, but must order a new trial.[2] Where the record does not show what the request was, or upon what issues an appellant desired a special verdict, a denial thereof will be presumed correct.[3] And it will be presumed that the jury was instructed to disregard improper argument, if the instructions are not in the transcript.[4]

Powder Co., 39 Cal. App. 223, 178 Pac. 531.

19. Brooks v. Douglass, 32 Cal. 208. See supra, § 505.

20. Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686; Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648.

1. Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711.

2. Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648.

3. Leonhart v. California Wine Assn., 5 Cal. App. 19, 89 Pac. 847.

4. Clarke v. Fast, 128 Cal. 422, 61 Pac. 72.

§ 508. Evidence on Trial and on Hearing of Motions.—When an appeal is taken upon the judgment-roll alone without any bill of exceptions, it is necessarily admitted by an appellant that no errors were committed in the admission or rejection of evidence, and that the evidence sustains and justifies the findings.[5] In such case it will be presumed that the court ruled correctly in admitting evidence, that the evidence was competent and admissible under the pleadings,[6] that it went in without objection,[7] or that all objections were waived,[8] and that it supports the verdict, or findings and judgment.[9] It will be presumed, in the absence of anything in the record justifying a contrary inference, that the preliminary proof showing the admissibility of written evidence was made.[10] And when evidence is admissible for a limited purpose only and the instructions are not in the record, it will be presumed that the trial court so limited it.[11]

Where evidence was excluded.—A ruling excluding evidence is presumed correct where the evidence is no part of the record and no offer of proof was made.[12] Where the record does not disclose the nature or grounds of

5. Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826.

6. Ellsworth v. Middleton, 1 Cal. Unrep. 153; Brett v. Vanomar Producers, 31 Cal. App. Dec. 33, 187 Pac. 758; California Canneries Co. v. Great Western Lumber Co., 30 Cal. App. Dec. 368, 185 Pac. 1008; McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521; Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548.

7. Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Brett v. Vanomar Producers, 31 Cal. App. Dec. 33, 187 Pac. 758; California Canneries Co. v. Great Western Lumber Co., 30 Cal. App. Dec. 368, 185 Pac. 1008; Adler v. Sawyer, 40 Cal. App. 778, 181 Pac. 817.

8. Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Poledori v. Newman, 116 Cal. 375, 48 Pac. 325.

9. See infra, § 514.

10. Nemo v. Farrington, 7 Cal. App. 443, 94 Pac. 874, 877.

11. More v. Finger, 128 Cal. 313, 60 Pac. 933.

12. Ellsworth v. Middleton, 1 Cal. Unrep. 153; Spangenberg v. Nesbitt, 22 Cal. App. 274, 281, 134 Pac. 343; Cone v. Keil, 18 Cal. App. 675, 124 Pac. 548; Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 Pac. 469; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

an objection to offered evidence, and a valid objection could have been made to receiving the evidence, it will be assumed in favor of a ruling excluding the evidence that such objection was made.[13] Where a court excluded evidence on the ground it would take judicial notice thereof, and the evidence was admissible, it will be presumed that the court did as it announced it would do.[14] Where the trial court in admitting incompetent evidence reserves the right to strike it out, if it sees fit, it may be presumed that it did so.[15] And where testimony is received upon the understanding that it was not to be considered unless other facts are proved, and the case shows that the party offering it failed to make such proof, it will be presumed on appeal that the testimony was discarded.[16]

Upon appeal from orders.—Where the record upon an appeal from an order does not show the evidence upon which the order was based, it will be presumed that the order was properly made, and that the evidence necessary to sustain it was presented to the court.[17] An indorsement of certain affidavits that they were used on the hearing does not raise any presumption that such affidavits constitute all the affidavits used, and it will be presumed in favor of an order that other evidence and affidavits were received on the hearing sufficient to support it.[18] And when it appears from the order itself that, in addition to the affidavits, oral evidence was heard on the motion, it must be presumed that the oral evidence war-

13. Baker v. Joseph, 16 Cal. 173; Rose v. Doe, 4 Cal. App. 680, 89 Pac. 135.

14. Gambert v. Hart, 44 Cal. 542.

15. Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023.

16. Jones v. Morse, 36 Cal. 205.

17. State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Estate of Dean, 149 Cal. 487, 87 Pac. 13; Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; McAulay v. Truckee Ice Co., 79 Cal. 50, 21 Pac. 434 (order granting change of venue); Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Strathern v. Dakin, 63 Cal. 478; Espinosa v. Gould, 32 Cal. App. Dec. 152, 190 Pac. 481; Patterson v. Rutherford, 39 Cal. App. 647, 179 Pac. 704.

18. Estate of Dean, 149 Cal. 487, 87 Pac. 13.

ranted the order made, even though it be conceded that the affidavits in themselves are insufficient.[19]

§ 509. **Instructions.**—Instructions not incorporated in the record will be presumed correct and will not be reviewed.[20] When the record contains no part of the evidence, the judgment will not be disturbed on account of instructions alleged to be erroneous, unless it appears that such instructions would have been erroneous under every conceivable state of facts.[1] In such case it will be presumed that the evidence was such as to justify instructions objected to as being misleading because abstract propositions of law.[2] Instructions are to be read and considered as a whole. Hence, the fact that some of them, when taken severally, fail to enunciate propositions of law in precise terms and with legal accuracy, does not render them erroneous if the imperfections are modified or qualified by the remaining instructions.[3] Where, therefore, all the instructions are not included in the record, it will be presumed that were the whole charge before the appellate court, all their imperfections were harmonized and a correct statement of the law was made.[4]

19. Berri v. Rogers, 168 Cal. 736, 145 Pac. 95.

20. Heffner v. Gross, 179 Cal. 738, 178 Pac. 860; Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458; Garrison v. McGlockley, 38 Cal. 78. See Abrahams v. Hammel, 40 Cal. App. 11, 180 Pac. 41, holding it may be assumed that proper instructions were given.

1. Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; Baldwin v. Bornheimer, 48 Cal. 433.

2. Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; Onell v. Chappell, 38 Cal. App. 375, 176 Pac. 370.

3. Humphfres v. Western Pac. Ry. Co., 173 Cal. 428, 160 Pac. 415; Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Doty v. O'Neil, 95 Cal. 244, 30 Pac. 526; Murray v. White, 82 Cal. 119, 23 Pac. 35; Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190, 22 Pac. 590; Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545; Robinson v. Smith-Booth-Usher Co., 32 Cal. App. 735, 164 Pac. 29. See TRIAL.

4. Foster v. Young, 172 Cal. 317, 156 Pac. 476; Hanson v. Stinehoff,

If the record does not show at whose request instructions were given, it will be presumed that they were requested by the appellant who claims them to be erroneous.[5] And likewise where there is a failure to give an instruction and the record does not show a request therefor, it will be presumed that no request was made.[6]

Verdict and Findings.

§ 510. In General.—All reasonable inferences are to be indulged to support the findings and verdict.[7] It cannot be presumed upon appeal that a trial court in making its findings ignored the rules for determining the sufficiency of the evidence.[8] Nor will it be presumed that the trial court allowed itself to be influenced by evidence which was stricken out.[9] And where the findings are amply sustained by competent evidence, it will be presumed that the trial court disregarded incompetent evidence admitted over objection.[10] When it is necessary to establish certain facts, such as fraud and undue influence, that the evidence be clear and convincing, it will be presumed, in support of a finding of such fact, that the trial court was governed by these considerations in weighing the evidence.[11] So, too, in support of a verdict it must be presumed that the jury decided the case

139 Cal. 169, 72 Pac. 913; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; O'Brien v. New Method Co-operative Laundry Co., 38 Cal. App. 531, 176 Pac. 879; Robinson v. Smith-Booth-Usher Co., 32 Cal. App. 735, 164 Pac. 29; Churchill v. More, 4 Cal. App. 219, 88 Pac. 290. See Stanton v. French, 83 Cal. 194, 23 Pac. 355, reversing judgment because it appeared from the record that no other instructions were given.

5. Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Skrocki v. Stahl, 14 Cal. App. 1, 110 Pac. 957; Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128.

6. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323.

7. Rolland v. Porterfield, 60 Cal. Dec. 159, 191 Pac. 913.

8. Mellor v. Bank of Willows, 173 Cal. 454, 160 Pac. 567.

9. Simmons v. Stephens, 32 Cal. App. Dec. 685, 191 Pac. 978.

10. Roth v. Thomson, 40 Cal. App. 208, 180 Pac. 656.

11. Ford v. Ford, 30 Cal. App. Dec. 611, 186 Pac. 164.

upon the theory adopted by the parties,[12] and that they followed the instructions and found the facts to be such as to justify their verdict in the light of the law laid down in the instructions.[13]

Proceedings as to findings.—When the record is silent upon the subject, it will be presumed that the proceedings in respect to the preparation and filing of findings were regular.[14] In the absence of a contrary showing, it will be presumed that the appellant waived service upon him of proposed findings.[15] And where the findings and judgment are filed upon the same day, it will be presumed the findings were first filed.[16]

§ 511. Construction of Findings.—Since all presumptions are in favor of the findings of the trial court, an appellate court in reviewing the findings will give them a liberal construction in support of the judgment.[17] Any uncertainties in the findings are to receive such construction as will uphold rather than defeat the judgment,[18] as will give them effect rather than destroy

12. Humphfres v. Western Pac. R. Co., 173 Cal. 428, 160 Pac. 415.

13. Estate of Clark, 180 Cal. 395, 181 Pac. 639; Kimic v. San Jose-Los Gatos I. R. Co., 156 Cal. 273, 104 Pac. 312; Olcese v. Hardy, 40 Cal. App. 323, 180 Pac. 666.

Where the trial court limits the consideration of evidence, it will be presumed on appeal that it was considered by the jury only for that purpose; De Bock v. De Bock, 29 Cal. App. Dec. 833, 184 Pac. 890.

14. Doty v. Jenkins, 142 Cal. 497, 77 Pac. 1104 (where the findings are filed the next day after the close of the evidence, it will be presumed that the court regularly adjourned until that time); Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970 (presumptions that findings were waived or filed before judgment entered, although they follow the judgment in the transcript and bear date subsequent to entry of judgment); Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213, where additional findings are filed, it will be presumed exceptions for defective findings were filed and served.

15. California Central Creameries Co. v. Crescent City L. W. & Power Co., 30 Cal. App. 619, 159 Pac. 209.

16. Benton v. Benton, 122 Cal. 395, 55 Pac. 152.

17. Haight v. Haight, 151 Cal. 90, 90 Pac. 197; Adler v. Sawyer, 40 Cal. App. 778, 181 Pac. 817.

18. E. W. McLellan Co. v. East San Mateo Land Co., 166 Cal. 736,

them.[19] All the findings are to be read together, and must be reconciled to prevent any conflict upon material points, if such reconciliation is possible.[20] In reviewing the sufficiency of the findings to support the judgment, regard will be had to the ultimate facts found, and not to mere probative facts, which are not shown by the findings to be the only facts proved, and from which alone the court finds the ultimate facts. In the absence of such showing, the mere circumstance that some of the probative facts are inconsistent with the ultimate facts

137 Pac. 1145; Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715; Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282, 78 Pac. 721; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Breeze v. Brooks, 97 Cal. 72, 22 L. R. A. 256, 31 Pac. 742; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Dahne v. Dahne, 33 Cal. App. Dec. 313, 193 Pac. 785; Armstrong v. Barceloux, 34 Cal. App. 433, 167 Pac. 895; Haller v. Yolo Water & Power Co., 34 Cal. App. 317, 167 Pac. 197; Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 Pac. 13; Randisi v. Simone, 26 Cal. App. 661, 147 Pac. 1176; Beggs v. Smith, 26 Cal. App. 532, 147 Pac. 585; Pacific States Corp. v. Arnold, 23 Cal. App. 672, 139 Pac. 239; Parker v. Herndon, 19 Cal. App. 451, 126 Pac. 183; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672; Marshutz v. Seltzoo, 5 Cal. App. 140, 89 Pac. 877; Brenneke v. Smallman, 2 Cal. App. 306, 83 Pac. 302; Griffin v. Pacific Electric Ry. Co., 1 Cal. App. 678, 82 Pac. 1084.

The same rule applies to special verdicts. Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Millard v. Hathaway, 27 Cal. 119.

19. Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379, findings "should be so construed ut res magis valeat quam pereat."

20. Haight v. Haight, 151 Cal. 90, 90 Pac. 197; Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Randall v. Hunter, 66 Cal. 512, 6 Pac. 331 (but where findings appear to be utterly irreconcilable, the court will not attempt to reconcile them); Kimball v. Lohmas, 31 Cal. 154; Polack v. McGrath, 38 Cal. 666; Terry v. Southwestern Bldg. Co., 30 Cal. App. Dec. 41, 185 Pac. 212; Adler v. Sawyer, 40 Cal. App. 778, 181 Pac. 817. This rule is limited by another rule, that the findings must be interpreted so as to be within the issues. E. W. McLellan Co. v. East San Mateo Land Co., 166 Cal. 736, 137 Pac. 1145.

will not prevent the ultimate facts from controlling.[1] And whenever the facts found are such as might authorize different inferences therefrom, it will be presumed that the inference made by the trial court was one that will uphold rather than defeat the judgment.[2] In such case the appellate court will not draw from those facts any inference of fact contrary to that which might have been drawn by the trial court for the purpose of rendering its judgment.[3]

§ 512. Relation of Findings to Issues.—In the absence of an assignment of error that the trial court failed to find upon a material issue, it will be presumed that the findings cover all the issues.[4] Where it is contended that there is no finding upon an issue made by the pleadings, and the record does not show the evidence given on the trial, it will not be presumed, against the correctness of the judgment, that any evidence was given thereon.[5] But

1. Brown v. Mutual Reserve Fund Life Assn., 137 Cal. 278, 70 Pac. 187; Commercial Bank v. Redfield, 122 Cal. 405, 55 Pac. 160; Rankin v. Newman, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304; Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740; Smith v. Acker, 52 Cal. 217; Pico v. Cuyas, 47 Cal. 174; Breeze v. International Banking Corp., 25 Cal. App. 437, 143 Pac. 1066.

2. Taylor v. Avila, 175 Cal. 203, 165 Pac. 533; San Pedro, L. A. & S. L. R. R. Co. v. City of Long Beach, 172 Cal. 631, 158 Pac. 204; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659; Nevills v. Moore Min. Co., 135 Cal. 561, 67 Pac. 1054; Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57; Gould v. Eaton, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; Breeze v. Brooks, 97 Cal. 72, 22 L. R. A. 256, 31 Pac. 742; Simpson v. Malter, 30 Cal. App. Dec. 227, 185 Pac. 675; Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 Pac. 13; Randisi v. Simone, 26 Cal. App. 661, 147 Pac. 1176; Myers v. Holton, 9 Cal. App. 114, 98 Pac. 197; Griffin v. Pacific Electric Ry. Co., 1 Cal. App. 678, 82 Pac. 1084.

3. Haight v. Haight, 151 Cal. 90, 90 Pac. 197; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659; Breeze v. Brooks, 97 Cal. 72, 22 L. R. A. 256, 31 Pac. 742; Rossi v. Beaulieu Vineyard, 20 Cal. App. 770, 130 Pac. 201; Griffin v. Pacific Electric Ry. Co., 1 Cal. App. 678, 82 Pac. 1084.

4. Heinlen v. Martin, 59 Cal. 181.

5. Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098.

it will be presumed that no evidence was introduced which was responsive to such issue, or that the claim of the party on that issue was abandoned on the trial.[6] This rule applies not only to issues that are made to the allegations of the complaint by the answer, but also to the issues made by the averment of new matter in the answer.[7] But it can have no application to a failure to make a finding upon a material issue when the court gives as a reason therefor that the finding was immaterial.[8]

Findings outside the issues.—As against a contention that certain findings are not within the issues, it will be presumed, in the absence of evidence, that facts found which might have been presented in a case by formal pleadings were supported by evidence introduced by the parties under stipulation, or at least without objection.[9]

6. Hertel v. Emireck, 178 Cal. 534, 174 Pac. 30; Coats v. Coats, 160 Cal. 671, 36 L. R. A. (N. S.) 844, 118 Pac. 441; Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Damon v. Quinn, 143 Cal. 75, 76 Pac. 818; John A. Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 Pac. 422; Horwege v. Sage, 137 Cal. 539, 70 Pac. 621; Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Little v. Smith, 31 Cal. App. Dec. 985, 189 Pac. 1059; Wood v. Dailey, 30 Cal. App. Dec. 452, 186 Pac. 177; Huntington v. Vavra, 36 Cal. App. 352, 172 Pac. 166; Engebritsen v. Latin-American Pub. Co., 38 Cal. App. 141, 175 Pac. 652; Agnew v. Nelson, 27 Cal. App. 39, 148 Pac. 819; Calkins v. Berliner, 26 Cal. App. 601, 147 Pac. 985; Vujacich v. Southern Commercial Co., 21 Cal. App. 439, 132 Pac. 80; Erving v. Napa Valley Brewing Co., 18 Cal. App. 135, 122 Pac. 836 (where there was no finding as to a complaint in intervention); Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719 (presumed counterclaim abandoned); Downing v. Donegan, 1 Cal. App. 710, 82 Pac. 1111.

7. Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848.

8. Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 13 L. R. A. 137, 26 Pac. 203, and it will be assumed that evidence was introduced upon such issue sufficient to support the allegation.

9. McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278 (where the court erroneously refused to allow an amendment setting up an issue, but the error was later cured by receiving evidence and finding thereon, it will be presumed on an appeal on the judgment-roll that the evidence was received without objection and that it sustained the finding); Poledori v.

Upon an appeal on the judgment-roll alone, it will be presumed from a general finding upon an issue that the parties treated the answer as sufficient to raise such an issue.[10] But consent to try outside issues will not be presumed where the evidence on such issues is admissible as tending to prove facts in issue.[11] Moreover, such presumption will not be indulged where it would amount to a presumption of error, as where the objectionable finding is in conflict with the judgment.[12] And it will not be indulged, even in favor of the judgment, when the finding is contrary to facts admitted by the pleadings, as it will not be presumed that evidence was introduced to contradict an admission of record.[13]

Newman, 116 Cal. 375, 48 Pac. 325; Churchill v. Baumann, 95 Cal. 541, 30 Pac. 770 (per De Haven, J., specially concurring); White v. White, 86 Cal. 219, 24 Pac. 996 (there being no bill of exceptions, it must be assumed, in support of the judgment, that the appellant made no objection to the introduction of evidence attacking the validity of the contract. The parties, therefore, must be treated as having waived all objection and as having tried the issue on its merits); Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Murdock v. Murdock, 33 Cal. App. Dec. 489, 194 Pac. 762; McCord v. Martin, 32 Cal. App. Dec. 404, 191 Pac. 89; Pioneer Truck Co. v. Hawley, 32 Cal. App. Dec. 315, 190 Pac. 1037; Norton v. Newerf, 30 Cal. App. Dec. 886, 187 Pac. 57; Smith v. Golden State Syndicate, 30 Cal. App. Dec. 9, 185 Pac. 209; Adler v. Sawyer, 40 Cal. App. 778, 181 Pac. 817. See supra, § 69.

10. Figliera v. Radis, 180 Cal. 660, 182 Pac. 418. But see Estate of McKinley, 49 Cal. 152, holding even in the absence of evidence, it would not be presumed that the court found some fact not relied on in the answer which would have justified the decision.

11. Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299.

12. Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400.

13. Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80 (in this case the court found a different contract from that alleged in the complaint and not denied in the answer, and rendered judgment accordingly. On appeal by the plaintiff on the judgment-roll, it was held that it would not be presumed that evidence was introduced without objection to prove the subsequent agreement on which the judgment rested. The court distinguishes Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186, on the ground that there was a bill of exceptions in that case, and therefore the court did not rely upon any presumption); Gregory v. Nelson, 41 Cal. 278; Burnett v. Stearns, 33 Cal. 468.

§ 513. Implied Findings.—Under the act of 1861 providing in substance that no judgment shall be reversed for want of finding unless exceptions be taken to the want of finding, it was repeatedly held that where the findings were silent as to the material facts necessary to support the judgment and no effort was made to correct them, it would be presumed in aid of the judgment that the necessary facts were proved unless the contrary appeared. The only questions arising upon the findings in such case then were, Are the findings within the issues? And, Are they consistent with the judgment?[14] The code has done away with the doctrine of implied findings as based upon this act. Under the rule established by the Code of Civil Procedure, when the facts are found, it must appear affirmatively that they support the judgment. And where there is no express finding as to an issue, it will not be presumed that a finding thereon was waived.[15] This rule has no application when findings are waived. In that case it will be presumed that the trial court found all matters of fact in issue and necessary to support the judgment in favor of the successful party.[16]

14. Smith v. Penny, 44 Cal. 161; Poppe v. Athearn, 42 Cal. 606; Smith v. Cushing, 41 Cal. 97; Shelby v. Houston, 38 Cal. 410 (the court could not therefore disturb the judgment, unless it found some facts have been expressly found by the court below which were repugnant to it); Carpentier v. Small, 35 Cal. 346; Morrill v. Chapman, 35 Cal. 85; Bernal v. Gleim, 33 Cal. 668; Sears v. Dixon, 33 Cal. 326; Tewksbury v. Magraff, 33 Cal. 237; James v. Williams, 31 Cal. 211; Henry v. Everts, 30 Cal. 425; Lyons v. Leimback, 29 Cal. 139; Lucas v. City of San Francisco, 28 Cal. 591; Hurlburt v. Jones, 25 Cal. 225. See Emmal v. Webb, 36 Cal. 197, as to limitation on power of court to infer a fact to have been found.

But the court could not be presumed to have found upon a matter as to which no issue was raised. Bernal v. Gleim, 33 Cal. 668; Gifford v. Carvill, 29 Cal. 589.

15. First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45; Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; North Pacific R. R. Co. v. Reynolds, 50 Cal. 90; Fratt v. Toomes, 48 Cal. 28.

16. Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; Antonelle v. Board of New City Hall Commissioners, 92 Cal. 228, 28 Pac. 270; Long v. Saufley, 89 Cal. 437, 26 Pac. 902; Myers v. Tibbals, 72 Cal. 278, 13

§ 514. Presumption as to Sufficiency of Evidence.—It is the duty of an appellant to point out the evidence or lack of evidence showing a finding assailed is unsupported by evidence.[17] Findings not attacked on the ground that they are unsupported by the evidence must be presumed to be true.[18] And in the absence of any transcript of the evidence, or bill of exceptions, and of a specification of insufficiency of the evidence to justify the verdict or decision, when required,[19] it will be presumed that the evidence offered in support of the findings was competent and material to the issues, was received without objection,[20] and was sufficient to support the facts found.[1] And it will be further assumed that there was

Pac. 695; Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Clark v. Johnston, 33 Cal. App. Dec. 181, 193 Pac. 864; Curtin v. Black Oak Development Co., 35 Cal. App. 1, 168 Pac. 1157; Bruce v. Bruce, 16 Cal. App. 353, 116 Pac. 994.

17. Robben v. Benson, 29 Cal. App. Dec. 791, 185 Pac. 200.

18. Estate of Wikman, 148 Cal. 642, 84 Pac. 212; Smith v. Los Angeles & P. Ry. Co., 98 Cal. 210, 33 Pac. 53; Robben v. Benson, 29 Cal. App. Dec. 791, 185 Pac. 200.

19. See infra, this section.

20. See supra, § 508.

1. Realty & Rebuilding Co. v. Rea, 61 Cal. Dec. 11, 194 Pac. 1024; Shuken v. Cohen, 179 Cal. 279, 176 Pac. 447; Estate of O'Hare, 178 Cal. 114, 172 Pac. 385 (presumption that evidence upholds conclusion of court as to persons entitled to distribution of an estate); Shuken v. Cohen, 179 Cal. 279, 176 Pac. 447; Harmon v. De Turk, 176 Cal. 758, 169 Pac. 680; Garrison v. North Pasadena Land & Water Co., 163 Cal. 235, 124 Pac. 1009; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846; Estate of Young, 149 Cal. 173, 85 Pac. 145; Estate of Wikman, 148 Cal. 642, 84 Pac. 212; Neumann v. Moretti, 146 Cal. 25, 79 Pac. 510; Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 Pac. 1050; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Chamberlain v. Loewenthal, 138 Cal. 47, 70 Pac. 932; Freman v. Marshall, 137 Cal. 159, 69 Pac. 986; Estate of Dow, 133 Cal. 446, 65 Pac. 890; Bowers' California Dredging Co. v. San Francisco Bridge Co., 132 Cal. 342, 64 Pac. 475; McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Larkin v. Mullen, 128 Cal. 449, 60 Pac. 1091; Swafford v. Board of Education, 127 Cal. 484, 59 Pac. 900; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Powell v. Bank of Lemoore, 125 Cal. 468, 58 Pac. 83; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557; Steen v. Hendy, 4 Cal. Unrep. 916,

no evidence before the court which in any respect qualified or limited the effect of the findings, or the ordinary construction to be given to the language in which they are expressed.[2]

38 Pac. 718; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Muir v. Meredith, 82 Cal. 19, 22 Pac. 1080; Schenck v. Hartford F. Ins. Co., 71 Cal. 28, 11 Pac. 807; Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Bonner v. Quackenbush, 51 Cal. 180; King v. Wellman, 38 Cal. 595; Doll v. Anderson, 27 Cal. 248; Branger v. Chevalier, 9 Cal. 353; Gates v. Buckingham, 4 Cal. 286; Ringgold v. Haven, 1 Cal. 108; Gonzales v. Huntley, 1 Cal. 32 (distinguished in Belt v. Davis, 1 Cal. 134); In re Antoldi's Estate, 7 Cal. Unrep. 211, 81 Pac. 278; Davis v. Lamb, 5 Cal. Unrep. 765, 35 Pac. 306; Moore v. Moore, 4 Cal. Unrep. 190, 34 Pac. 90; Haley v. Nunan, 2 Cal. Unrep. 189; Savings & Loan Society v. Horton, 2 Cal. Unrep. 137; Yocum v. Taylor, 33 Cal. App. Dec. 748, 195 Pac. 62; Murdock v. Murdock, 33 Cal. App. Dec. 489, 194 Pac. 762; Cooney v. Gray, 33 Cal. App. Dec. 391, 194 Pac. 61; People v. Arcega, 33 Cal. App. Dec. 129, 193 Pac. 268; Simons v. Porterfield, 33 Cal. App. Dec. 166, 193 Pac. 172; Holmgren v. Madalena, 33 Cal. App. Dec. 56, 192 Pac. 867; Williams v. Stearns, 32 Cal. App. Dec. 586, 191 Pac. 965; Brown v. Brown, 32 Cal. App. Dec. 488, 191 Pac. 782; Stone v. Hancock, 30 Cal. App. Dec. 559, 186 Pac. 604; California Canneries Co. v. Great Western Lumber Co., 30 Cal. App. Dec. 368, 185 Pac. 1008; Williams v. Reed, 30 Cal. App. Dec. 89, 185 Pac. 515; Dillon v. Dillon, 30 Cal. App. Dec. 1018, 187 Pac. 27 (as to residence of plaintiff in divorce action); Smith v. Golden State Syndicate, 30 Cal. App. Dec. 9, 185 Pac. 209; Western California Land Co. v. Welch, 41 Cal. 435, 183 Pac. 169; People ex rel. Bradford v. Arcega, 28 Cal. App. Dec. 1188; Ruperd v. Hunter, 40 Cal. App. 96, 180 Pac. 638; Hepler v. Wright, 35 Cal. App. 567, 170 Pac. 667; Rivera v. Cappa, 29 Cal. App. 496, 156 Pac. 1016, 1017; Dietz v. Scott, 27 Cal. App. 320, 149 Pac. 775; Breeze v. International Banking Corp., 25 Cal. App. 437, 143 Pac. 1066; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297; Holland v. Canty, 23 Cal. App. 91, 137 Pac. 276; Newmire v. Ford, 20 Cal. App. 337, 128 Pac. 952; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113; Hoover v. Lester, 16 Cal. App. 151, 116 Pac. 2[illegible]; Conde v. Sweeney, 14 Cal. App. 20, 110 Pac. 973; Myers v. Holton, 9 Cal. App. 114, 98 Pac. 197; Berryman v. Gibson, 7 Cal. App. 679, 95 Pac. 671; Hill v. Clark, 7 Cal. App. 609, 95 Pac. 382; McFarland v. Matthai, 7 Cal. App. 599, 95 Pac. 179 (and a statement in the appellant's brief that the judgment was procured upon false testimony cannot be considered); Bither v. Christensen, 1 Cal. App. 90, 81 Pac. 670.

2. Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659.

When the bill of exceptions specifies certain particulars in which it is claimed the findings are unsupported by the evidence, it will be presumed to contain all the evidence in the particulars specified.[3] But it will not be presumed to contain any evidence upon points not specified, and the verdict or findings will be presumed to be sustained by the evidence as to such points.[4]

When a verdict or vital finding is based on the testimony of one witness, and this testimony is contradictory, it will be presumed that the trier of fact found some reasonable or legal excuse for the inconsistency and has justification for concluding that upon the whole the witness told the truth.[5] Upon an appeal from a judgment for the defendant upon the judgment-roll alone, it may be assumed, if necessary, that the plaintiff introduced no evidence upon his cause of action.[6]

In absence of specification of insufficiency.—Where no specification of the insufficiency of the evidence to justify the findings is made in the bill of exceptions, it must be presumed that the findings are supported by the evidence.[7] The fact that there is some evidence in the record bearing on a finding which is not in itself sufficient to support it cannot be considered, for it is only when the finding is directly challenged in this respect that the appellate court must assume that all the evidence bearing on the subject is in the record.[8]

§ 515. Review of Evidence.—Because of the presumptions in favor of the verdict and findings and judgment, the appellate court when reviewing the evidence in support of a verdict or finding, or, in the absence thereof,

3. See infra, § 526.

4. Hidden v. Jordan, 28 Cal. 301.

5. Firth v. Southern Pacific Co., 30 Cal. App. Dec. 681, 186 Pac. 815.

6. Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 Pac. 339.

7. Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658.

8. Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 370; Rogers v. Ponet, 21 Cal. App. 577, 132 Pac. 851.

in support of the judgment, must take into consideration all the evidence rather than certain disconnected portions thereof.[9] It must accept as true all evidence tending to establish the correctness of the finding or verdict, and it must consider it in the most favorable aspect toward the prevailing party,[10] and give to him the benefit of every inference that can reasonably be drawn in support of his claim.[11] A mere doubt as to whether a finding is justified by the evidence will not authorize the appellate court to set aside the finding.[12] Rules to guide juries in passing upon the facts are not applicable to appellate courts in passing upon the sufficiency of the evidence.[13] Since

9. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Rose v. Doe, 4 Cal. App. 680, 89 Pac. 135. See Keyes v. Nims, 29 Cal. App. Dec. 649, 30 Cal. App. Dec. 37, 184 Pac. 695, holding that only the evidence of the prevailing party need be considered.

10. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 Pac. 951; Hassell v. Bunge, 167 Cal. 365, 139 Pac. 800; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 Pac. 1157; Fraser v. Sheldon, 164 Cal. 165, 128 Pac. 33; Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818, 119 Pac. 512; Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Carter v. Roberts, 140 Cal. 164, 73 Pac. 818; Showers v. Zanone, 7 Cal. Unrep. 263, 85 Pac. 857; Chastek v. Albertson, 32 Cal. App. Dec. 398, 191 Pac. 371; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820.

11. Bandle v. Commercial Bank, 178 Cal. 546, 174 Pac. 44; Hallidie v. First Federal Trust Co., 177 Cal. 600, 171 Pac. 431; Kimic v. San Jose-Los Gatos I. R. Co., 156 Cal. 273, 104 Pac. 312 (this rule applies as well when an attack is made upon a verdict as excessive); Friend & Terry Lumber Co. v. Devine, 33 Cal. App. Dec. 579, 194 Pac. 754; Maloof v. Davis, 32 Cal. App. Dec. 385, 191 Pac. 59; Walsh v. Bradshaw, 16 Cal. App. 586, 117 Pac. 689; Rose v. Doe, 4 Cal. App. 680, 89 Pac. 135 (the correctness of the findings is not impeached by the fact that at some stage in the case the court may have given or expressed a contrary opinion).

12. Taylor v. Kelley, 103 Cal. 178, 37 Pac. 216.

13. The rule that where there are two or more probable causes for the injury sued for, the plaintiff cannot recover if his evidence leaves it just as probable that the injury was the result of a cause not rendering the defendant liable as otherwise, is a rule to guide the jury rather than a rule to guide the appellate court in passing upon the evidence. Peters v. McKay & Co., 136 Cal. 73, 68 Pac. 478; Ross

in cases formerly denominated cases in equity the jury, when called in, acts simply in an advisory capacity, and the court, being compelled to make findings of its own, is free to adopt or reject the findings of the jury as it deems proper, it follows, that in determining whether the findings of the trial court are sustained by the evidence in such cases, it is immaterial that such findings are contrary to the findings of the jury.[14]

When the evidence is conflicting, the court will presume that the evidence in support of the verdict or findings is true,[15] and construe it and resolve every substantial conflict as favorable as possible in support thereof.[16] The presumption on appeal is not only in favor of the ultimate fact declared in the findings, but when there are no special findings and it appears that there was a material conflict in the evidence in the court below as to the probative facts essential to be found to support the ultimate fact, the further presumption obtains that the conflict was resolved in such a manner as to sustain the general finding.[17]

v. San Francisco-Oakland T. Rys. Co., 32 Cal. App. Dec. 415, 191 Pac. 703.

The rule, if it be the rule, that the testimony of detectives and police officers or persons having a personal interest in the outcome of the issue before the court must be viewed with caution and that a judgment should not be predicated alone on such testimony has no application to reviewing courts; People v. Arcega, 33 Cal. App. Dec. 132, 193 Pac. 264.

14. De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059.

15. Woody v. Bennett, 88 Cal. 241, 26 Pac. 117; California Bank v. Sayre, 85 Cal. 102, 24 Pac. 713; Holder Lumber Co. v. Scarborough, 28 Cal. App. 152, 151 Pac. 674; Marston v. Watson, 20 Cal. App. 465, 129 Pac. 611; Walsh v. Bradshaw, 16 Cal. App. 586, 117 Pac. 689; Ah Gett v. Carr, 3 Cal. App. 47, 84 Pac. 458.

16. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 Pac. 1157; Layng v. Mount Shasta Mineral Spring Co., 135 Cal. 141, 67 Pac. 48; Nelson v. McCarty, 5 Cal. App. 773, 91 Pac. 406.

17. Ballard v. Nye, 138 Cal. 588, 72 Pac. 156; Borderre v. Den, 106 Cal. 594, 39 Pac. 946.

§ 516. Waiver of Findings.—Upon appeal from the judgment, upon the judgment-roll alone, where no findings appear therein, it cannot be presumed that the mere absence of findings constitutes error. But since findings of fact may be waived, in the absence of some affirmative showing to the contrary, by bill of exceptions or in other appropriate manner, the presumption arises that they were waived,[18] and that the court found all the facts necessary to sustain its judgment.[19] As was said in an early case, a party who comes to the supreme court to say that the court below committed an error in failing to find the facts must, by bill of exceptions or some other similar and appropriate method, make it affirmatively appear by the record that no waiver of findings had in fact occurred in the court below; otherwise the intendment here must go to the support and not to overthrow the judgment therein.[20] The rule that the findings will be presumed to have been waived has no application where the only reasonable inference from the record is directly to the contrary, and especially where the record

18. Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Horwege v. Sage, 137 Cal. 539, 70 Pac. 621; Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85; Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 592, 28 Pac. 44; Estate of Arguello, 85 Cal. 151, 24 Pac. 641; Goyhinech v. Goyhinech, 80 Cal. 410, 22 Pac. 175; Gordon v. Donahue, 79 Cal. 501, 21 Pac. 970 (and where findings bearing date subsequent to the judgment and not indorsed "filed" are included in the record, it will be presumed that the clerk immediately after entry of the judgment made up the judgment-roll. The purported findings cannot therefore be regarded as a portion thereof, and it will be presumed findings were waived); Van Court v. Winterson, 61 Cal. 615; Carr v. Cronan, 54 Cal. 600; Smith v. Lawrence, 53 Cal. 34; People v. Forbes, 51 Cal. 628; Mulcahy v. Glazier, 51 Cal. 626 (distinguishing Dowd v. Clarke, 51 Cal. 262); Hutton v. Newhouse, 41 Cal. App. 689, 183 Pac. 276; California Central Creameries Co. v. Crescent City Light, W. & P. Co., 30 Cal. App. 619, 159 Pac. 209; Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700; Continental Bldg. & Loan Assn. v. Woolf, 12 Cal. App. 725, 108 Pac. 729.

19. See supra, § 513.

20. Mulcahy v. Glazier, 51 Cal. 626.

shows that the party moved to vacate the judgment and asked the court to make findings.[1] It cannot, therefore, have force as against a writing clearly intended to be a finding upon a material issue filed by the judge of the court below.[2]

§ 517. Amount of Recovery.—The law presumes that the award of damages in cases in which there is no accurate standard by which to compute the injury is the result of full and careful deliberation, and prompted by fair and just motives, and this presumption acquires added strength when the trial judge, who has heard all the evidence, reviews the verdict on motion for new trial and declines to disturb it.[3] It is not to be presumed that the jury included in their verdict any award for injury concerning which there was no evidence and which was not specifically alleged in the complaint,[4] or that they regarded an allegation as to damages which, properly, should be rejected as surplusage.[5] It cannot be assumed that they allowed more upon any particular item than was properly allowable.[6] Nor can it be presumed from the mere fact that the verdict is not for a large sum of money, that the jury ignored any element of damage. Any such presumption would carry the court into the realm of the most unsatisfactory speculation.[7]

1. People v. Forbes, 5 Cal. 628 (where there is a recital in the decree that the court found the facts in the complaint to be true, it will not be presumed that a finding upon an affirmative issue in the answer is waived); Saul v. Moscone, 16 Cal. App. 506, 118 Pac. 452.

2. Kimball v. Stormer, 65 Cal. 116, 3 Pac. 408.

3. Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138. See infra, § 541, as to power to review amount of recovery. See DAMAGES.

4. Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666.

5. McDonald v. McConkey, 57 Cal. 325.

6. Washington v. Pacific Electric R. Co., 14 Cal. App. 685, 112 Pac. 904.

7. Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663.

§ 518. **Findings of Referee.**—The rule of presumptions is applicable to the findings of a referee.[8] If there is nothing in the record to the contrary, it will be presumed that the findings of a referee were sustained by the evidence.[9] But the presumption as to waiver of findings applicable to findings of a court[10] can have no application to a report of a referee for the reason that no provision is made for a waiver in such cases.[11] Where a large mass of contradictory evidence is reported, it will be presumed in favor of an order setting aside a referee's report on the ground that his findings are against the weight of the testimony, that the court below properly weighed the evidence.[12]

Judgment and Orders Subsequent Thereto.

§ 519. **Judgment.**—The judgments of superior courts will be presumed regular if there is nothing in the record on appeal to the contrary.[13] Where there are several causes of action in the complaint, one of which is good, it will be presumed in favor of the judgment that was based upon that which is good.[14] If a judgment can be entered only on order of court, it will be

8. Parker v. Page, 38 Cal. 522, implied findings presumed under former practice. See infra, § 552.

9. Donahue v. Cromartie, 21 Cal. 80.

10. See supra, § 516.

11. Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85.

12. McHenry v. Moore, 5 Cal. 90.

13. Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766 (presumption as to failure to present cost bill when no costs are awarded); Sherman v. Sherman, 32 Cal. App. Dec. 3, 190 Pac. 464 (presumed that allowance of counsel fees in separate maintenance suit was made upon motion); Treis v. Berlin Dye Wks. & L. Co., 11 Cal. App. 421, 105 Pac. 275 (presumption as to amount); Tibbals Oakum Co. v. Meigs, 11 Cal. App. 298, 104 Pac. 844 (presumption as to amount).

14. Watson v. Lawson, 166 Cal. 235, 135 Pac. 961; Nielsen v. Provident Sav. L. Assur. Soc., 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082.

presumed such order was made.[15] If two judgments have been entered in a cause, and the record is silent as to the reason therefor, the latter in point of time must be deemed the true judgment in the case, and it will be presumed that circumstances existed authorizing the court to set the former aside.[16] In the absence of anything in the record to the contrary, it will be presumed in favor of a judgment rendered upon a judgment of a foreign state which does not carry interest that any excess is attributable to costs.[17] Where, in an action to recover specific personal property, judgment is rendered for damages without any judgment for its return, it will be presumed on appeal, in the absence of any showing in the record to the contrary, that it was shown at the trial that the property in controversy had been lost or destroyed.[18] And if judgment for possession of such property is rendered without an alternative judgment for damages in case delivery cannot be had, it will be presumed that it appeared at the trial that the plaintiff had already obtained possession of the property.[19]

Judgment against sureties.—The entry of judgment against the sureties upon a bond to stay execution is not a special proceeding in favor of which no presumption will be indulged where the jurisdictional facts do not appear on its face, but is part of the procedure in the original action in favor of which all reasonable presumptions will be indulged.[20]

15. Beaumont v. Midway Provident Oil Co., 21 Cal. App. 128, 131 Pac. 106.

16. Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572; Hawley v. Gray Bros. A. Stone Pav. Co., 127 Cal. 560, 60 Pac. 437; Butler v. Soule, 124 Cal. 69, 56 Pac. 601; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264.

17. Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318.

18. Brown v. Johnson, 45 Cal. 76.

19. Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411.

20. Hawley v. Gray Bros. A. Stone Pav. Co., 127 Cal. 560, 60 Pac. 437 (presumption as to vacation of prior premature judgment); Meredith v. Santa Clara Min. Assn., 60 Cal. 617 (presumption as

§ 520. **Judgment by Default.**—Upon an appeal from a judgment by default, the appellate court must indulge in all reasonable presumptions and intendments in favor of the judgment.[1] A default judgment will be presumed regular although an answer of the defendant appears in the judgment-roll.[2] If it does not appear that the court received and heard any testimony, it will be presumed that it informed itself as to the matter of complaint in a proper and regular manner.[3] Where a motion to strike out an answer and for judgment as by default is based upon all the papers on file, it will be presumed on an appeal upon the judgment-roll that there was something in the papers on file, not a part of the judgment-roll, which warranted a judgment for an amount less than that claimed in the complaint.[4] So, also, where an answer is on file, it will be presumed in favor of an order denying a motion for judgment by default that the answer was properly on file.[5]

§ 521. **Subsequent Orders.**—Every intendment must be indulged in favor of orders made subsequent to judgment.[6] In the absence of anything in the record on appeal to the contrary, it will be presumed in favor of an

to notice); First National Bank v. Kowalsky, 3 Cal. Unrep. 759, 31 Pac. 1133 (presumption as to affidavit in support of motion for judgment). See SURETYSHIP.

1. Kreling v. McMullen, 158 Cal. 433, 111 Pac. 252 (presuming in favor of a default judgment foreclosing a pledge rendered in favor of an assignee, that the action was brought by the holder of the principal obligation); De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787; Nevin v. Gary, 12 Cal. App. 1, 106 Pac. 422 (presuming court heard facts establishing the joint wrong of the defendant tort-feasors so as to authorize a joint judgment against them).

2. De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787.

3. Crane v. Brannan, 3 Cal. 192.

4. People v. Otto, 77 Cal. 50, 18 Pac. 872.

5. Gilbert v. Kelly, 138 Cal. 689, 72 Pac. 344.

6. Estate of Bell, 157 Cal. 528, 108 Pac. 497 (order refusing to retax costs); Security Loan & T. Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257 (order refusing to set aside judgment by default); Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019 (order setting aside excessive verdict).

order vacating default, that the application was made within the time prescribed by the statute,[7] that an answer was filed with the application,[8] that the affidavits were sufficient to justify the order,[9] that the order was made upon any good ground consistent with the record,[10] or that any other state of facts consistent with the record which authorized the order existed.[11] Where the application is denied, it will be presumed that the court believed the statements in the affidavit of the plaintiff.[12] And it is presumed, in the absence of anything in the record to the contrary, that the court faithfully performed its duty in reference to an appointment made to carry out the provisions of a decree, and that the conditions authorizing such appointment existed.[13]

Order Granting or Refusing New Trial.

§ 522. In General.—All presumptions are in favor of an order granting or denying a new trial, and the burden is upon the appellant to make it affirmatively appear by a proper record that the order complained of is erroneous.[14] In the absence of anything in the record to the

7. George Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59, 108 Pac. 878.

8. Bailiff v. Hildebrandt, 32 Cal. App. Dec. 295, 191 Pac. 42 (holding presumption could not be indulged because of statements in the record).

9. Wood v. Johnston, 8 Cal. App. 258, 96 Pac. 508.

10. Fox v. Townsend, 149 Cal. 659, 87 Pac. 82.

11. Curtin v. Dunne, 10 Cal. App. 586, 102 Pac. 825 (presumption that stipulation was authorized by plaintiff).

12. Gillingham v. Lawrence, 11 Cal. App. 231, 104 Pac. 584.

13. Turner v. Billagram, 2 Cal. 520.

14. Connell v. Higgins, 170 Cal. 541, 150 Pac. 769; Wyckoff v. Pajaro Valley Consol. R. R. Co., 146 Cal. 681, 81 Pac. 17; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Weed v. Reed, 142 Cal. 679, 76 Pac. 652 (presumption that bill of exceptions was used upon motion); Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524 (presumption as to filing of counter-affidavits on motion for new trial); Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791 (where the statement on new trial does not contain a map but does contain a direction, "Here insert

contrary, it will be presumed that an affidavit on a motion for new trial was received and considered by the court without objection.[15] As reference may be made on the hearing of the motion to the pleadings in the case for the purpose of ascertaining the issues and determining the correctness of the court's rulings, it will be presumed such reference was made.[16] Where it appears that the evidence is conflicting upon the principal question of fact, it will be presumed, in favor of an order granting a new

tracing of map," it will be presumed that the court on the hearing of the motion had the map before it, where the parties stipulated that the statement was correct, and such stipulation was approved by the court); Estate of Scott, 124 Cal. 671, 57 Pac. 654; In re Yoakam, 103 Cal. 503, 37 Pac. 485; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789 (presumption as to service of statement); Pico v. Cohn, 67 Cal. 258, 7 Pac. 680 (errors not specified in statement were presumed to have been disregarded under the former practice); Patrick v. Morse, 64 Cal. 462, 2 Pac. 49 (decided before the amendment of 1915 prohibiting the extension of time to move for new trial, and holding it will be presumed the parties consented to an extension of time); Blum v. Sunol, 63 Cal. 341; Savage v. Sweeney, 63 Cal. 340; Valentine v. Stewart, 15 Cal. 387 (holding on motion to reject statement, that signature of judge is presumptive evidence of regularity of prior proceedings); Hammel v. Stone, 2 Cal. Unrep. 785, 14 Pac. 675; Craig v. Allen, 2 Cal. Unrep. 634, 9 Pac. 429; Garnier v. Grimaud, 2 Cal. Unrep. 214; Whiting v. Steen, 2 Cal. Unrep. 175; Page v. O'Brien, 1 Cal. Unrep. 316; Matiasick v. Pacific Electric Ry. Co., 31 Cal. App. Dec. 4, 187 Pac. 461; Title Land Co. v. Schaefer, 41 Cal. App. 294, 182 Pac. 463 (where the record was defective); Donnatin v. Union Hardware & Metal Co., 38 Cal. App. 8, 175 Pac. 26; Hastaran v. Marchand, 23 Cal. App. 126, 137 Pac. 297 (it is presumed that the court in passing on a motion for new trial ignored a statement which failed to specify errors); Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Bouchard v. Abrahamsen, 4 Cal. App. 430, 88 Pac. 383; Miller v. Griffith, 4 Cal. App. 341, 88 Pac. 285; McConnell v. Fox, 2 Cal. App. 329, 83 Pac. 259 (per Smith, J., holding it will be presumed, in favor of a motion denying a new trial on the ground of abuse of discretion in denying a continuance, that the case was fairly tried, that the appellant was in no wise injured by his absence from the trial, and that there was no abuse of discretion); Clark v. Rauer, 2 Cal. App. 259, 83 Pac. 291; Baldwin v. Napa & Sonoma Wine Co., 1 Cal. App. 215, 81 Pac. 1037.

15. Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742.

16. Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627.

trial on the ground of insufficiency of the evidence to sustain the decision, that the court changed its opinion as to the effect of the evidence and reached a conclusion on the hearing of the motion favorable to the adverse party.[17] The same presumption must be indulged although the motion is heard by a judge who did not try the case, as he by the rules of law occupies the place of the trial judge, and is clothed with all his powers and duties.[18] Where the court denies a motion for new trial made on the ground of newly discovered evidence, and the evidence is not in the record, it must be assumed in support of his order that he was of the opinion the evidence set forth in the affidavits was cumulative.[19]

§ 523. Notice of Intention to Make Motion.—The notice of intention to move for a new trial is not a part of the record on appeal, and need not be included therein.[20] If the record recites the giving of notice of intention to move for a new trial, it will be presumed the notice was given in due time and that it was in due form.[1] It has several times been contended that an order on motion for new trial cannot be considered because the notice of intention is not in the record, and that the appellate court cannot know upon what grounds the motion was made. While it is necessary that it should in some way be made to appear in the record what the grounds for new trial were, if there is a bill of exceptions containing specifications of insufficiency of evidence and assignments of errors of law, and it appears that the court ruled on the motion as upon the merits, the presumption, in the absence of anything to the contrary, is that the notice was duly given,[2] and that the specifications and assignments

17. Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26.

18. Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791.

19. Sirkus v. Central R. Co., 3 Cal. Unrep. 535, 30 Pac. 790.

20. See supra, § 245.

1. Frost v. Meetz, 52 Cal. 665.

2. Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Schneider v. Market

conformed to those in the notice and constituted the grounds upon which the court was asked to grant a new trial.[3] But where the bill of exceptions contains a purported copy of the notice of intention and such notice designates no proper grounds for the motion, it cannot be presumed in support of an order granting a new trial that another notice designating sufficient grounds was given.[4]

Where the court strikes out a notice of motion for new trial, it will be presumed, in the absence of any showing in the record to the contrary, that the moving party consented thereto.[5] Distinguishable from these cases is that in which it is claimed that it was error to deny a motion for new trial when the record is silent as to the

St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Bank v. Healdsburg v. Hitchcock, 76 Cal. 489, 18 Pac. 648 (it will not be presumed that no notice of intention was given, where the order denies the motion on the ground that a motion for new trial is not a proper remedy); Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318 (holding the presumption is that the notice was given or waived. But in Pico v. Cohn, 78 Cal. 384, 20 Pac. 706, the court says: "We do not put this upon the ground of waiver by the opposite party, as is done in some of the earlier cases"); Hegard v. California Ins. Co., 72 Cal. 535, 14 Pac. 359; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Gray v. Nunan, 63 Cal. 220 (holding that as the court appeared to have denied the motion upon the questions presented by the motion itself, it would be presumed the court found the proper notice was given or that the defendant had waived the objection); Frost v. Meetz, 52 Cal. 664; Lincoln v. Sibeck, 27 Cal. App. 61, 148 Pac. 967.

3. Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Schneider v. Market St. Ry. Co., 134 Cal. 483, 66 Pac. 734 (distinguishing Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Leonard v. Shaw, 114 Cal. 72, 45 Pac. 1012); Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706 (overruling Calderwood v. Brooks, 28 Cal. 151; Wright v. Snowball, 45 Cal. 654; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773, and all other cases laying down a contrary rule of practice); Lincoln v. Sibeck, 27 Cal. App. 61, 148 Pac. 967. See Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 Pac. 1090; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66, holding under Code Civ. Proc., § 661, that the particulars as to which the evidence is insufficient to justify the findings which are specified in the statement are presumably those presented and argued at the hearing.

4. Mazkewitz v. Pimental, 83 Cal. 450, 23 Pac. 527.

5. Wilson v. Dougherty, 45 Cal. 34.

service of notice upon an adverse party and as to his participation in the motion. In such case it will be presumed in support of the order that notice was not given, that the superior court did not have jurisdiction to grant the motion for a new trial, and that said motion was therefore properly denied.[6]

§ 524. **Grounds for Order.**—When an order granting a new trial is silent as to the ground upon which it is made, and the record shows the existence of a valid ground, it will be presumed that the order was based on that ground.[7] And where the order is granted upon a discretionary ground, every presumption will be indulged in favor of the proper exercise by the trial court of its judicial discretion.[8] This presumption obtains even where the order is made by another judge than the one who tried the case.[9] In the absence of a bill of exceptions showing what papers were used on the motion, it will be presumed that the motion was in part based upon some ground upon which affidavits could be used, that

6. Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080.

7. Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Lamb v. Hall, 147 Cal. 37, 81 Pac. 286; Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449; Newman v. Overland Pacific Ry. Co., 132 Cal. 73, 64 Pac. 110; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; In re Martin, 113 Cal. 479, 45 Pac. 813; Curtiss v. Starr & Co., 85 Cal. 376, 24 Pac. 806; Matiasick v. Pacific Electric Ry. Co., 31 Cal. App. Dec. 4, 187 Pac. 461; Title Land Co. v. Schaefer, 41 Cal. App. 294, 182 Pac. 463; Winslow v. McCarthy, 39 Cal. App. 337, 178 Pac. 720; Whitney v. Northwestern Pac. R. R. Co., 39 Cal. App. 139, 178 Pac. 326; McNutt v. Pabst, 23 Cal. App. 232, 143 Pac. 68; Union Lumber Co. v. Webster, 15 Cal. App. 165, 113 Pac. 891 (presuming in favor of order denying new trial that newly discovered evidence was cumulative); Hubbell Oil Co. v. Morrison, 7 Cal. App. 457, 94 Pac. 589; Clark v. Rauer, 2 Cal. App. 259, 83 Pac. 291. See Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104, holding it will not be presumed that a refusal of a new trial was based upon a failure to serve a statement in time if the court made an order relieving the party from his default.

8. Crooks v. Miller, 89 Cal. 35, 26 Pac. 615.

9. Blum v. Sunol, 63 Cal. 341.

affidavits were in fact used on the hearing, and were sufficient to justify the court in making the order.[10] If one of the grounds for granting a new trial is that the verdict is against law, it will be presumed, in the absence of any instructions appearing in the record, that the verdict is contrary to the instructions actually given.[11]

If the notice was in fact set forth in the bill of exceptions, and it appeared therefrom that it was either insufficient or was not given within the proper time, it will be assumed that the motion was denied on that ground, unless it appears that the respondent accepted service of either the notice of intention, or of the proposed statement or bill of exceptions, or that he suggested any amendments thereto, or was present at the settlement.[12]

Insufficiency of evidence.—Prior to 1919, it was frequently held that if one of the grounds of a motion for new trial was the insufficiency of the evidence to justify the decision, and the order did not exclude this from the grounds upon which the order was made, it would be assumed that the order was made on this ground,[13] pro-

10. Wyckoff v. Pajaro Valley Consol. R. R. Co., 146 Cal. 681, 81 Pac. 17; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904; Title Land Co. v. Schaefer, 41 Cal. App. 294, 182 Pac. 463; Thompson v. Wheeler, 5 Cal. App. 195, 89 Pac. 1065.

11. Miller v. Griffith, 4 Cal. App. 341, 88 Pac. 285.

12. Reclamation District v. Thisby, 131 Cal. 572, 63 Pac. 918, citing Dominguez v. Mascotti, 74 Cal. 269. See, also, Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080, presumption as to failure to serve notice on adverse party.

13. Rahmel v. Rost, 178 Cal. 15, 171 Pac. 1068; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911 (and this presumption would be indulged regardless of any reason stated in the opinion of the court); Cooper v. Spring Valley Water Works, 145 Cal. 207, 78 Pac. 654; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 Pac. 110; Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; In re Martin, 113 Cal. 479, 45 Pac. 813; Tide Land Reclamation Co. v. Cunningham, 71 Cal. 221, 16 Pac. 711; Hook v. Hall, 68 Cal. 22, 8 Pac. 596; Savage v. Sweeney, 63 Cal. 340; Harloe v. Berwick, 7 Cal. Unrep. 58, 70 Pac. 1060; Austin v. Gagan, 3 Cal. Unrep. 533, 30 Pac. 790; Craig v. Allen, 2 Cal. Unrep. 634, 9 Pac. 429; Renton v. Cannon (Cal.), 9 Pac. 423; Clohan v. Kelso, 29 Cal. App.

vided the statement or bill of exceptions used on such motion contained a specification of the insufficiency of the evidence to justify the verdict or decision.[14] This rule, however, was changed by specific statutory enactment in 1919. The provision is as follows:

"When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground."[15]

Appeal.

§ 525. **In General.**—Reasonable presumptions also will be indulged in favor of the proceedings in taking an appeal, and of the regularity of official acts relating thereto.[16] Where the record shows the rendition of judgment before the judgment-roll was made up, but does not show the exact date of entry, it will be presumed the judgment was entered before the judgment-roll was made up.[17] An attorney assuming to act for an appellant will be presumed to have authority to do so.[18] Where no

Dec. 103, 183 Pac. 349; Karst v. Finn, 39 Cal. App. 369, 178 Pac. 973; Pacific Gas & Electric Co. v. Rollins, 32 Cal. App. 782, 164 Pac. 53; Shilling v. Dodge, 22 Cal. App. 517, 135 Pac. 299; Hughes Bros. v. Rawhide Gold Min. Co., 16 Cal. App. 293, 116 Pac. 969. See supra, §§ 478, 479.

The presumption in this case is against the findings rather than in their favor. Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; Hass v. Mutual Relief Assn., 118 Cal. 6, 49 Pac. 1056; Marr v. Whistler, 33 Cal. App. Dec. 229, 193 Pac. 600; Clohan v. Kelso, 29 Cal. App. Dec. 103, 183 Pac. 349.

14. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332. See supra, § 407.

15. Code Civ. Proc., § 657; Marr v. Whistler, 33 Cal. App. Dec. 229, 193 Pac. 600.

16. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294; Young v. Rosenbaum, 39 Cal. 646 (presumption that the statement on appeal was duly served); Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868 (presumption against inexcusable neglect in proceeding for settlement of statement).

17. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294.

18. Woodbury v. Nevada Southern Ry. Co., 120 Cal. 367, 52 Pac. 650; Ricketson v. Torres, 23 Cal. 636, 649; In re Meade's Estate, 5 Cal. Unrep. 678, 49 Pac. 5. See ATTORNEYS AT LAW.

notice of appeal is in the record, and the respondent raises no objection, it will be presumed that a proper notice of appeal was filed and that its insertion in the record was waived.[19] So, also, when a new affidavit of service of notice of appeal showing due service is filed, it will be presumed that a reference therein to the "notice of appeal in the above-entitled action" relates to the original notice, the copy of which is printed in the transcript.[20]

§ 526. **Record.**—The clerk's certificate to the transcript must be assumed to state the truth in the absence of anything to the contrary.[1] And in the absence of a showing to the contrary, it will be presumed that the pleadings, order, findings and judgment mentioned in the certificate are those which constitute the judgment-roll.[2] So, also, the certificate of a judge to a bill of exception carries with it a presumption of regularity.[3] In the absence of anything in the record to the contrary, it must be presumed in favor of the action of the trial court that the time for the settlement of the bill was extended by stipulation or by order of the court,[4] and that the bill was served within the extended time.[5] In other words, it is the duty of the respondent to have matter incorporated

19. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430.

20. Martin v. De Ornelas, 139 Cal. 41, 72 Pac. 440.

1. San Diego Inv. Co. v. Crane, 40 Cal. App. 393, 180 Pac. 837. See supra, § 322, as to conclusiveness.

2. O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

3. Hughes Mfg. & L. Co. v. Elliott, 167 Cal. 494, 140 Pac. 17; Regents of University of California v. Turner, 159 Cal. 541, Ann. Cas. 1912C, 1162, 114 Pac. 841 (no presumption as to proposed amendments when bill was settled without notice or engrossment); Sullivan v. Washburn & Moen Mfg. Co., 139 Cal. 257, 72 Pac. 992 (presumption as to exclusion from bill of exceptions of irrelevant and useless matter); Cottle v. Leitch, 43 Cal. 320 (presumption as to overruling objection to settlement); Valentine v. Stewart, 15 Cal. 387 (on motion to reject statement).

4. Reay v. Butler, 69 Cal. 572, 11 Pac. 463 (where bill was not settled until after appeal taken); Sheppard v. Sheppard, 15 Cal. App. 615, 115 Pac. 751.

5. Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976.

in the bill which affirmatively shows that the proceedings were irregular.[6]

Contents.—It is presumed that the record exhibits all matters material to a consideration of the points presented.[7] When a bill of exceptions is contained in the record as a part of the judgment-roll, it is presumed to contain all the evidence material to the rulings to which exceptions were reserved and which are specified therein.[8] This presumption obtains though the record does not state that it contains all the evidence.[9] In such case an appellate court can no more assume that error appearing therein was cured by some matter not contained in the bill than it can consider matters outside of the record for the purpose of impeaching the correctness of the judgment.[10] It will not, therefore, be presumed that other evidence would support the findings assailed.[11] On the contrary, if there was any evidence which would explain or overcome that set forth in the bill, it is the duty of the respondent to cause it to be incorporated therein.[12] It is not presumed, however, that the bill of exceptions contains all the evidence upon points not specified.[13]

6. Hughes Mfg. & L. Co. v. Elliott, 167 Cal. 494, 140 Pac. 17.

7. Bonner v. Lehfeldt, 39 Cal. App. 649, 179 Pac. 722.

8. Estate of Taylor, 131 Cal. 180, 63 Pac. 345; Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Wilson v. Atkinson, 68 Cal. 590, 10 Pac. 203; Abbey Homestead Assn. v. Willard, 48 Cal. 614; Clark v. Gridley, 35 Cal. 398; Smith v. Athern, 34 Cal. 506; Hidden v. Jordan, 28 Cal. 301; Metz v. Bell, 7 Cal. Unrep. 41, 70 Pac. 618; Madden v. Ashman, 1 Cal. Unrep. 583; Polkinghorn v. Riverside Portland Cement Co., 24 Cal. App. 615, 142 Pac. 140; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907; Couson v. Wilson, 2 Cal. App. 181, 83 Pac. 262.

9. Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Smith v. Athern, 34 Cal. 506; Hidden v. Jordan, 28 Cal. 301.

10. Grigsby v. Clear Lake Water Co., 40 Cal. 396; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907.

11. Bonner v. Lehfeldt, 39 Cal. App. 649, 179 Pac. 722; Lunnon v. Morris, 7 Cal. App. 710, 95 Pac. 907.

12. Couson v. Wilson, 2 Cal. App. 181, 83 Pac. 262.

13. See supra, § 514.

IV. DISCRETION OF LOWER COURT.

General Principles.

§ 527. Rule Stated.—It is well established that an exercise by a trial court of a discretionary power will not be reviewed or disturbed except for an abuse of discretion.[14] The only limitation that the law has placed upon

14. In re Estate of Cowper, 179 Cal. 347, 176 Pac. 676 (discretion in appointing a guardian for an incompetent person); Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 175 Pac. 690 (discretion in referring to jury the question of contributory negligence of a child); Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 Pac. 1037; Estate of Cowell, 170 Cal. 362, 149 Pac. 808 (discretion as to allowance to widow); Estate of Bazzuro, 161 Cal. 71, 118 Pac. 434 (discretion of probate court in confirming sale of property); Estate of Bump, 152 Cal. 274, 92 Pac. 643 (discretion as to allowance to widow); Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929 (discretion as to whether witness to mental condition of testator is an intimate acquaintance); Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313 (discretion as to division of community property in divorce action); Treadwell v. Treadwell, 134 Cal. 158, 66 Pac. 197 (discretion as to compensation to be paid to referees in partition suit); Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955; Estate of Lux, 114 Cal. 73, 45 Pac. 1023 (the discretion in making allowance to widow will not be disturbed where no abuse is shown); Rose v. Rose, 112 Cal. 341, 44 Pac. 658 (discretion as to division of community property in divorce action); Dickerson v. Dickerson, 108 Cal. 351, 41 Pac. 475 (as to discretion in awarding custody of children); Estate of Wax, 106 Cal. 343, 39 Pac. 624 (quoting People v. Pico, 62 Cal. 50, as to discretion of court as to whether witness to sanity of another is an intimate acquaintance); Barnhart v. Kron, 88 Cal. 447, 26 Pac. 210 (discretion as to costs); Estate of Arguello, 85 Cal. 151, 24 Pac. 641 (discretion of probate court in holding delay in petitioning for a sale of real property is excusable); Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 551; O'Connor v. Ellmaker, 83 Cal. 452, 23 Pac. 531; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (per Ross, J., on rehearing, discretion as to allowance of alimony); Hobbs v. Amador & Sacramento Canal Co., 66 Cal. 161, 4 Pac. 1147 (discretion in modifying a temporary injunction); St. John v. Kidd, 26 Cal. 263 (discretion in allowing an exception); People v. Frisbie, 26 Cal. 135; Payne v. Pacific Mail Steamship Co., 1 Cal. 33; Thornton v. Thompson, 1 Cal. Unrep. 170; Commercial Nat. Bank v. Roberts, 53 Cal. App. Dec. 477, 194 Pac. 751 (as to proper exercise of discretion in determining whether there was adequate consideration for an al-

the exercise of discretionary judicial power is, that it must not be abused.[15] An appellate court will not interfere even though it may doubt the correctness of the ruling of the trial court.[16] Unless it is able to say that a clear abuse of discretion is made to appear, it will not substitute its opinion and thereby divest the trial court of the discretionary power reposed in it.[17]

It will be presumed in favor of the action of the court that its discretion was properly exercised, and the burden rests upon the appellant to show an abuse of discretion.[18]

§ 528. When is Discretion Abused.—Conceding that a court may deny an application addressed to its judicial discretion, it does not necessarily follow that it is an abuse of discretion to grant the application, for it may often happen that a decision in favor of either party would not appear to be an abuse of discretion. To say that the law allows no latitude for the exercise of discretionary power, is to deny that the power is discretionary.[19] Therefore, it is not sufficient for an appellant complaining of a denial of his application merely to cite to an appellate court cases in which orders granting such

leged fraudulent conveyance); Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253 (discretion as to custody of children in divorce action); Webster v. Webster, 30 Cal. App. Dec. 311, 185 Pac. 863 (order granting alimony); Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719 (discretion in dividing community property); Estate of McPhee, 10 Cal. App. 162, 101 Pac. 530 (as to requiring further security of a personal representative); County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972 (discretion as to consolidation of proceedings for condemnation of separate parcels of land). See People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074 ("In some courts this discretion is not reviewable; in others it is reviewable only in case of its abuse; in others it is said 'largely' to control").

15. Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493.

16. Utah Nevada Co. v. De Lamar, 9 Cal. App. 759, 100 Pac. 884.

17. Smith v. Riverside Groves & W. Co., 19 Cal. App. 165, 124 Pac. 870.

18. See supra, § 501.

19. Lynn v. Knob Hill Imp. Co., 177 Cal. 56, 169 Pac. 1009; Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493.

motions have been sustained upon appeal.[20] An abuse of discretion does not necessarily imply a willful abuse or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered.[1] While it may be difficult to define exactly what is meant by an abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice.[2] As pointed out in an early case, the discretion to be exercised by a trial court is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to serve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates.[3]

Application of Rule.

§ 529. Application Generally.—The following matters are addressed to the discretion of the trial court, and, in accordance with the rule already stated, the action of the trial court thereon will not be disturbed, unless the record affirmatively shows that its discretion was abused: Applications for change of venue grounded upon the convenience of witnesses;[4] applications for continuance;[5] the

20. Lynn v. Knob Hill Imp. Co., 177 Cal. 56, 169 Pac. 1009.

1. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

2. Clavey v. Lord, 87 Cal. 413, 25 Pac. 493 (per Vanclief, C.).

3. Bailey v. Taaffe, 29 Cal. 422.

4. Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815; Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836; Schilling v. Buhne, 139 Cal. 611, 73 Pac. 431; Blossom v. Waller, 30 Cal. App. 439, 158 Pac. 509. See TRIAL.

5. Swayne & Hoyt v. Wells-Russell & Co., 169 Cal. 204, 146 Pac. 686

imposition of terms as condition to the granting of discretionary orders;[6] granting or refusing a temporary injunction;[7] dissolution or continuing in force of a preliminary injunction;[8] the modification of preliminary injunction;[9] the appointment of a receiver;[10] the removal of trustees who have violated or are unfit to exercise their trusts;[11] the propriety of stay in forcible entry and unlawful detainer,[12] and the vacation of a stay of execution.[13]

Costs and attorney's fees.—When costs and attorney's fees are in the discretion of the trial court, its award will not be reversed, unless the discretion of the trial court was abused.[14]

(discretion held abused); Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Kneebone v. Kneebone, 83 Cal. 645, 23 Pac. 1031; Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161; Musgrove v. Perkins, 9 Cal. 211; Willson v. McDonald, 1 Cal. Unrep. 516; Thornton v. Thompson, 1 Cal. Unrep. 170; McNett v. McNett, 30 Cal. App. Dec. 859, 187 Pac. 447; Abrook v. Ellis, 6 Cal. App. 451, 92 Pac. 396. See CONTINUANCES.

6. Williams v. Myer, 150 Cal. 714, 89 Pac. 972 (order allowing amendment to a pleading); Nicoll v. Weldon, 130 Cal. 666, 63 Pac. 63 (order relieving from default); Eltzroth v. Ryan, 91 Cal. 584, 27 Pac. 932 (order granting continuance); Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134 (order allowing supplemental answer); Rice v. Gashirie, 13 Cal. 53 (order granting new trial); Dollarhide v. Thorne, 1 Cal. Unrep. 2 (order setting aside judgment).

7. Fresno Canal & Irr. Co. v. People's Ditch Co., 174 Cal. 441, 163 Pac. 497; Beaudry v. Felch, 47 Cal. 183; Porter's Bar Dredging Co. v. Beaudry, 15 Cal. App. 751, 115 Pac. 951 (regardless of the question when conflicting affidavits do or do not preponderate against the order, the discretion of the court will not be disturbed unless abused). See INJUNCTION.

8. Jewell v. McKinley, 54 Cal. 600; Parrott v. Floyd, 54 Cal. 534.

9. Hobbs v. Amador & Sacramento Canal Co., 66 Cal. 161, 4 Pac. 1147.

10. Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515; Fox v. Flood, 30 Cal. App. Dec. 862, 187 Pac. 68. See RECEIVERS.

11. Tevis v. Butler, 103 Cal. 249, 37 Pac. 223. See TRUSTS.

12. See supra, § 214.

13. Lewis v. Lapique, 26 Cal. App. 448, 147 Pac. 221. See EXECUTIONS.

For other examples of matters addressed to the discretion of courts, see infra, §§ 530–538.

14. Estate of Bump, 152 Cal. 271, 92 Pac. 642 (discretion as to costs in probate proceedings); Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758 (attorney's fees in foreclosure suit); Miller v. Highland Ditch Co., 91 Cal. 103, 27 Pac. 536; Barnhart v. Kron, 88 Cal.

§ 530. Pleadings.—The trial court has a discretion to allow the filing of supplemental pleadings,[15] to allow the filing of an answer after demurrer overruled,[16] and to strike out the answer of a defendant for disobedience of a court order.[17] And the exercise of its discretion in these matters will not be reviewed except for an abuse.

Amendment to pleadings.—The granting or withholding of permission to file amended pleadings rests largely in the discretion of the trial court, and its action will not be reviewed on appeal unless an abuse of discretion appears.[18] It is the policy of the law for courts to be

447, 26 Pac. 210 (the allowance or disallowance of items for expenses incurred upon the trial is in the discretion of the judge); Kelly v. Central Pacific R. R. Co., 74 Cal. 565, 16 Pac. 390 (holding the court's discretion was abused). See COSTS.

15. Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134 (supplemental answer); Harding v. Minear, 54 Cal. 502 (supplemental answer); Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383. See PLEADING.

16. Thornton v. Borland, 12 Cal. 438.

17. Puycke v. Keefe, 114 Cal. 212, 46 Pac. 78.

18. Campbell v. Genshlea, 180 Cal. 213, 180 Pac. 336 (discretion in allowing amendment after decision and before judgment); Gartlan v. C. A. Hooper & Co., 177 Cal. 414, 170 Pac. 1115 (amendment of complaint to conform to proof after submission of cause); Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 Pac. 1037; Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; Schalich v. Bell, 173 Cal. 773, 161 Pac. 983 (where an amendment to an answer at beginning of trial was denied); Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811 (order denying amendment); Billesbach v. Larkey, 161 Cal. 649, 120 Pac. 31 (refusing leave to amend); Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818, 119 Pac. 512; Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 17 Am. St. Rep. 58, 57 Pac. 84; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687 (order denying leave to amend); Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955 (amendment after submission of cause for decision); Schultz v. McLean, 109 Cal. 437, 42 Pac. 557 (discretion to limit time to amend); Wixon v. Devine, 91 Cal. 477, 27 Pac. 777; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Graham v. Stewart, 68 Cal. 374, 9 Pac. 555; Lower Kings River Water Ditch Co. v. Kings River & Fresno C. Co., 67 Cal. 577, 8 Pac. 91 (holding discretion abused); Stearns v. Martin, 4 Cal. 227 (discretion as to second amendment); Hamlin v. His Creditors, 2 Cal. Unrep. 203 (the rule

liberal in granting amendments to pleadings in order that all the substantial merits of a cause may be reached and determined without unnecessary delay and in one suit,[19] and it is presumed that the trial court exercised its discretion in furtherance of justice and with the end in view of disposing of the case upon its merits.[20] Accordingly, the appellate court has frequently reversed for refusing to allow amendments,[1] but not for granting them;[2] yet whenever the court has exercised its power by granting or refusing an amendment, its ruling is only subject to review when it is apparent that an abuse of discretion has occurred.[3] In an ordinary case of insufficiency of averment, it will be deemed an abuse of discretion to refuse leave to amend.[4] Unless it is clear to the trial court that a defective complaint cannot be amended so as to obviate the objections to it, a plaintiff desiring it should be allowed a reasonable opportunity to amend.[5] A refusal of an amendment in such case would constitute an abuse of discretion, even though the complaint has been amended once previously.[6]

applies to cases of insolvency); Cook v. Suburban Realty Co., 20 Cal. App. 538, 129 Pac. 801 (refusing leave to amend); Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 301, 90 Pac. 203. See PLEADING.

19. Wixon v. Devine, 91 Cal. 477, 27 Pac. 777.

20. San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

1. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184 (holding discretion abused where complaint with amendment stated a cause of action); McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278 (discretion held abused); Riddell v. Mullan, 77 Cal. 577, 20 Pac. 91 (discretion held abused); Butler v. King, 10 Cal. 342.

2. Carter v. Lothian, 133 Cal. 451, 65 Pac. 962.

3. Wixon v. Devine, 91 Cal. 477, 27 Pac. 777.

4. Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

5. Payne v. Baehr, 153 Cal. 441, 95 Pac. 895; Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759. See San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365 (holding discretion in denying leave to amend is not abused where the complaint is incapable of amendment).

6. Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759. See PLEADING.

§ 531. **Dismissal.**—A trial court has general discretionary power without the aid of legislation to dismiss an action for want of prosecution, and the exercise of its discretion in cases not regulated by statute will not be disturbed upon appeal except for an abuse thereof.[7] No definite and fixed rule can be laid down for the exercise of discretion in the cases not regulated by statute, but discretion should be exercised, under the circumstances of the particular case, in conformity with the spirit of the law and in a manner to subserve, and not to impede or defeat, the ends of substantial justice.[8] Section 581a of the Code of Civil Procedure does not divest the trial court of discretionary power to dismiss for failure to issue or serve summons within the time prescribed, but fixes a limit beyond which the discretion ceases and a dismissal becomes mandatory.[9] Section 583 of the code applies only to delay in bringing the case to trial after answer filed and does not affect the power of the court in other cases.[10]

§ 532. **Trial.**—A trial court has a large discretion as to the conduct of the trial of an action, which will not be disturbed except in extreme cases, when the power of

7. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037 (holding discretion to have been abused); Pool v. Butler, 141 Cal. 46, 74 Pac. 444; Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326; San Jose Land & W. Co. v. Allen, 129 Cal. 247, 61 Pac. 1083; Hassey v. South San Francisco Homestead & R. Assn., 102 Cal. 611, 36 Pac. 945; Seymour v. Wood, 63 Cal. 81; Dupuy v. Shear, 29 Cal. 238 (discretion in striking out complaint for want of prosecution). See DISMISSAL, DISCONTINUANCE AND NONSUIT.

8. Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037; Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481.

9. Witter v. Phelps, 163 Cal. 655, 126 Pac. 593; Marks v. Keenan, 148 Cal. 161, 82 Pac. 772; Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037; People v. Jefferds, 126 Cal. 296, 58 Pac. 704; Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183; Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 658.

10. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002.

the court is grossly abused to the oppression of a party.[11] Accordingly, an appellate court will not disturb the action of the trial court upon the following matters unless an abuse of discretion appears: As to challenges to jurors;[12] as to the order of proof;[13] as to the sufficiency of the preliminary proof necessary to the introduction of documentary evidence;[14] or secondary evidence;[15] or to prove the qualifications of an expert witness;[16] and discretion in allowing a re-examination of a witness.[17] So, also, a trial court has a discretion as to the conduct of the examination of witnesses which will not be reviewed save for an abuse thereof.[18] This discretion includes discretion to allow leading questions to be put to witnesses;[19]

11. Broadus v. Nelson, 16 Cal. 79 ("an enlarged discretion"); Smith v. Billett, 15 Cal. 23. See Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430, holding refusal to direct officer taking deposition to exclude other persons while a witness is testifying, not reviewable unless abused. See TRIAL.

12. A discretion of a court in permitting a party to exercise his remaining peremptory challenge after the jury panel is filled and all the jurors have been examined and passed for cause by both parties will not be disturbed unless abused. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. See JURY.

13. First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551; Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; Lick v. Diaz, 37 Cal. 437; Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 Pac. 85; Baird v. Duane, 1 Cal. Unrep. 492. See TRIAL.

14. Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; Webster v. San Pedro Lumber Co., 101 Cal. 326, 35 Pac. 871. See EVIDENCE.

15. Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

16. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 42 Pac. 983; Krogh Mfg. Co. v. Churchill, 32 Cal. App. Dec. 393, 191 Pac. 74; Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Pac. 1128; Mabry v. Randolph, 7 Cal. App. 421, 94 Pac. 403; Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 Pac. 256.

17. De Witt v. Floriston Pulp & P. Co., 7 Cal. App. 774, 96 Pac. 397.

18. Zane v. De Onativia, 139 Cal. 328, 73 Pac. 856; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162 (discretion in admitting testimony upon the issue of insanity of the testator); Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94 (discretion as to admission of counter-proof upon a preliminary question as to admissibility of certain evidence). See TRIAL.

19. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713; Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

to admit evidence of experiments;[20] to permit a witness to substitute his opinion or conclusion for facts;[1] and to limit the examination into details,[2] or, subject to certain well-defined rules, the cross-examination.[3] The trial court has a large discretion as to the scope of the argument, and his action in permitting argument will not be disturbed unless grossly unfair or improper.[4] The power of opening a case for further testimony after it has been submitted rests in the sound discretion of the trial court and will not as a general rule be revised.[5] So, also, a trial court has a discretion to grant separate trials as between the plaintiff and separate defendants,[6] to allow a jury in a suit which under the former practice would have been denominated a suit in equity,[7] and to submit special issues or interrogatories to the jury.[8] And its action in these respects will not be disturbed except for an abuse of discretion.

20. Western Soil Bacteria Co. v. O'Brien Bros., 33 Cal. App. Dec. 422, 194 Pac. 72.

1. Nolan v. Nolan, 155 Cal. 476, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 520.

2. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

3. Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493. "The extent to which cross-examination shall be carried is in some degree a matter of discretion with the trial court." Grimbley v. Harrold, 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558.

4. Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83. See TRIAL.

5. Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; Miller v. Sharp, 49 Cal. 233; Foote v. Richmond, 42 Cal. 439; Preston v. Sonora Lodge, 39 Cal. 116; Pinkham v. McFarland, 5 Cal. 137; Bryant v. Hobert, 30 Cal. App. Dec. 535, 186 Pac. 379. See Marziou v. Pioche, 10 Cal. 545 (discretion of referee to open case).

6. Caldwell v. Regents of University of California, 35 Cal. App. 639, 170 Pac. 666. See TRIAL.

7. Graham v. Stewart, 68 Cal. 374, 9 Pac. 555.

8. George v. Los Angeles Ry. Co., 126 Cal. 357, 77 Am. St. Rep. 184, 46 L. R. A. 829, 58 Pac. 819; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557; Smith v. Occidental & O. S. S. Co., 99 Cal. 462, 34 Pac. 84; Cleghorn v. Cleghorn, 66 Cal. 309, 5 Pac. 516 (the court has discretion to refuse to submit special issues to a jury in a divorce case); Broadus v. Nelson, 16 Cal. 79; Eaton v. Southern Pacific Co., 22 Cal. App. 461, 134 Pac. 801.

But a refusal to submit special questions of fact for the sole reason that the party has omitted to write

§ 533. New Trial.—The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse.[9] It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter.[10] It has been said "that it is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial."[11] It is true such discretion is not a right to the exercise of the mere personal and arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised

out a proper form for the direction to the jury is not only an abuse of discretion, but a plain violation of the statute. Plyer v. Pacific Portland Cement Co., 152 Cal. 125, 92 Pac. 56.

9. Smith v. Royer, 181 Cal. 165, 183 Pac. 660; Scott v. Times-Mirror Co., 178 Cal. 688, 174 Pac. 312; Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507 (where new trial was granted because of misconduct of a party); Thompson v. California Construction Co., 148 Cal. 35, 82 Pac. 367; McCarthy v. Phelan, 132 Cal. 404, 64 Pac. 570 (discretion in granting a new trial in a suit to quiet title to a mining claim because the boundaries were insufficiently marked); Harrison v. Sutter St. Ry. Co., 116 Cal. 156; Groppengiesser v. Lake, 103 Cal. 37, 36 Pac. 1036; Dixon v. Pluns, 101 Cal. 511, 35 Pac. 1030 (where motion was denied upon conflicting evidence whether the verdict was a chance verdict); Lee v. Southern Pacific R. R. Co., 101 Cal. 118, 35 Pac. 572; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Minturn v. Bliss, 77 Cal. 90, 19 Pac. 185; Moore v. Murdock, 26 Cal. 514; Quinn v. Kenyon, 22 Cal. 82; Hanson v. Barnhisel, 11 Cal. 340; Hastings v. Steamer Uncle Sam, 10 Cal. 341; Grayson v. Guild, 4 Cal. 122; Nelson v. Floyd, 2 Cal. Unrep. 325, 4 Pac. 105; Garnier v. Grimaud, 2 Cal. Unrep. 214; Louderback v. Duffy, 1 Cal. Unrep. 137; Thurn v. Swain, 1 Cal. Unrep. 94; Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023; American Marine Paint Co. v. Nyno Line, 30 Cal. App. Dec. 861, 187 Pac. 71; Donnatin v. Union Hardware & Metal Co., 38 Cal. App. 8, 175 Pac. 26, 177 Pac. 845; Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007; Beedy v. San Mateo Hotel Co., 27 Cal. App. 653, 150 Pac. 810; O'Brien v. Big Casino Gold Min. Co., 9 Cal. App. 283, 99 Pac. 209; Ramsay v. McCreery Estate Co., 40 Cal. App. 190, 180 Pac. 544. See NEW TRIAL.

10. Sherwood v. Kyle, 125 Cal. 652, 58 Pac. 270.

11. Quinn v. Kenyon, 22 Cal. 82; Chambers v. Farnham, 39 Cal. App. 17, 179 Pac. 423; Briggs v. Hall, 20 Cal. App. 372, 129 Pac. 288; Morgan v. Los Angeles Pacific Co., 13 Cal. App. 12, 108 Pac. 735.

within those rules, to the accomplishment of justice. But so long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law for the action taken, such action will not be set aside, even if, as a question of first impression, the appellate court might feel inclined to take a different view from that of the trial court as to the propriety of its action. More especially is this true where the question rests largely in fact and involves the proper deduction to be drawn from the evidence as to which the opportunities of the trial court for reaching just conclusions in such instances are generally superior to those of the appellate court.[12]

Exception to rule.—But there is an exception to the general rule. Where the motion for new trial is founded entirely upon alleged errors of law in the proceedings of the trial court, and the order for a new trial is granted solely upon that ground, the appellate court will review the action of the trial court as in other cases where questions of law and not matters of mere discretion are involved.[13]

§ 534. For Newly Discovered Evidence—For Excessive Damages.—The granting or refusing of a motion for a new trial on the ground of newly discovered evidence is so far within the discretion of the trial court, that its action will not be disturbed except for a manifest abuse of discretion.[14] The ruling of a lower court upon a

12. Harrison v. Sutter St. Ry. Co., 116 Cal 156, 47 Pac. 1019 (per Van Fleet, J.); Ham v. County of Los Angeles, 31 Cal. App. Dec. 496, 189 Pac. 462; Otten v. Spreckels, 24 Cal. App. 251, 141 Pac. 224.

13. Cochran v. O'Keefe, 34 Cal. 554; O'Brien v. Brady, 23 Cal. 243.

14. Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 Pac. 1127; Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 Pac. 712; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; O'Brien v. Brady, 23 Cal. 243; Baker v. Joseph, 16 Cal. 173; Hoyt v. Saunders, 4 Cal. 345 (holding discretion in refusing new trial abused); Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023; Nadeau v. Lynch, 41 Cal. App. 755, 183 Pac. 278; Spencer v. Clarke, 15 Cal. App. 512, 115 Pac. 248;

motion for new trial upon the ground of newly discovered evidence is very rarely interfered with by an appellate court.[15] Newly discovered evidence as a ground for new trial is not regarded with favor,[16] and a refusal to grant a new trial will not be reversed unless it appears that the newly discovered evidence is such as must, if proved upon a new trial, change the result, and proper diligence has been shown in endeavoring to obtain such evidence.[17] It is only where there is an entire want of the showing required on such motion that it can be said as a matter of law that the court abused its discretion in granting the motion.[18]

For excessive damages.—A motion for new trial upon the ground of excessive damages appearing to have been given under the influence of passion or prejudice is addressed to the discretion of the trial court,[19] and its action in granting a new trial will not be disturbed unless it appears that the court has abused its discretion.[20] The appellate court will not reverse the order merely because it differs with the trial court as to what would have been just compensation, unless the difference of opinion is such as to justify the conclusion that the trial

Union Lumber Co. v. Webster, 15 Cal. App. 165, 113 Pac. 891; Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787; Rockwell v. Italian-Swiss Colony, 10 Cal. App. 633, 103 Pac. 162; Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93; Hubbell Oil Co. v. Morrison, 7 Cal. App. 457, 94 Pac. 589. See NEW TRIAL.

15. Spear v. United Railroads, 16 Cal. App. 637, 117 Pac. 956.

16. Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

17. Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93. See Spencer v. Clarke, 15 Cal. App. 512, 115 Pac. 248, holding discretion not abused where evidence was cumulative or was not of such character as would have changed the findings.

18. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 Pac. 712.

19. Hale v. San Bernardino Valley T. Co., 156 Cal. 713, 106 Pac. 83. See DAMAGES.

20. Shaw v. Southern Pacific R. R. Co., 157 Cal. 240, 107 Pac. 108; Sherwood v. Kyle, 125 Cal. 652, 58 Pac. 270; Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. 774; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; Du Brutz v. Jessup, 54 Cal. 118; Payne v. Pacific Mail Steamship Co., 1 Cal. 33; Donnatin v. Union Hdw. & M. Co., 38 Cal. App. 8, 175 Pac. 26, 177 Pac. 845. See DAMAGES.

court abused its discretion.[1] And when there is a material conflict of evidence regarding the extent of the damage, the imputation of abuse in granting a new trial is repelled, the same as if the ground of the order were insufficiency of evidence to justify the verdict.[2] The same is true where the evidence, though not conflicting, is such that different inferences may reasonably be drawn therefrom.[3]

§ 535. For Insufficiency of Evidence.—Insufficiency of the evidence to justify the verdict or decision is a ground for new trial appealing peculiarly to the discretion of the trial court, and its order either granting or refusing a new trial has not been disturbed on appeal in the absence of a showing of abuse of discretion.[4] The rule adopted

1. Lee v. Southern Pacific R. R. Co., 101 Cal. 118, 35 Pac. 572.

2. Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. 774; Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019.

3. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019.

4. Estate of Wall, 60 Cal. Dec. 140, 191 Pac. 687; McEwen v. Occidental L. Ins. Co., 172 Cal. 6, 155 Pac. 86; Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Estate of Everts, 163 Cal. 449, 125 Pac. 1058; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; Estate of Motz, 136 Cal. 558, 69 Pac. 294; Estate of Martin, 113 Cal. 479, 45 Pac. 813; Brooks v. San Francisco & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570; Warner v. F. Thomas P. Dyeing & Cleaning Wks., 105 Cal. 409, 38 Pac. 960; Estate of Carriger, 104 Cal. 81, 37 Pac. 785 (an order granting a new trial will not be reversed unless it appears that the trial judge had no reasonable ground for holding the verdict to be against the weight of evidence); Mills v. Oregon R. & Nav. Co., 102 Cal. 357, 36 Pac. 772; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Savage v. Sweeney, 63 Cal. 340; Phelps v. Union Copper Min. Co., 39 Cal. 407; De Vall v. Perrin, 34 Cal. App. 676, 168 Pac. 584; Hall v. Bark "Emily Banning," 33 Cal. 522; Hawkins v. Reichert, 28 Cal. 534; Moore v. Murdock, 26 Cal. 514, 525; O'Brien v. Brady, 23 Cal. 243; Watson v. McClay, 4 Cal. 288; Hammel v. Stone, 2 Cal. Unrep. 785, 14 Pac. 675; Kerr v. Kerr, 2 Cal. Unrep. 753, 13 Pac. 654; Macomber v. Yancy, 1 Cal. Unrep. 517; Lord v. Lord, 1 Cal. Unrep. 417; Farrell v. City of Ontario, 33 Cal. App. Dec. 393, 194 Pac. 69; Whitney v. Northwestern Pacific R. R. Co., 39 Cal. App. 139, 178

in the appellate court, that the verdict of a jury will not be disturbed on the ground of insufficiency of the evidence, unless it appears, without substantial conflict, that there is no evidence to sustain the verdict, has no application to the trial court. The judge of that court has the same opportunity to see the witnesses, to judge of their credibility, and of the degree of weight which ought to be given to their evidence, as the jury has, and is often better qualified to determine these questions than the jury itself.[5] If there is any appreciable conflict in the evidence, action of the court in granting a new trial is conclusive on the appellate court;[6] and even where there does not appear to be a conflict in the evidence, the action of the trial court will not be disturbed where there appears to flow from the general surrounding circumstances of the case, probable justification for discrediting or giving no weight to testimony which, on its face, may bear all the earmarks of probability.[7] The appellate court does not interfere with the action of the trial court in granting a new trial, even when the evidence on which it has acted may consist of depositions and documentary and oral evidence.[8] However, if, upon undisputed facts found, but one correct conclusion of law is possible and the superior court mistaking the law orders a new trial, its order will be reversed.[9] So, also, when the testimony is without substantial conflict, and there is no evidence to support the finding or verdict, an order refusing a new trial has been reversed.[10]

Pac. 326; Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007; Wright v. Yosemite Transp. Co., 28 Cal. App. 279, 152 Pac. 54; Otten v. Spreckels, 24 Cal. App. 251, 141 Pac. 224; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Baldwin v. Napa & Sonoma Wine Co., 1 Cal. App. 215, 81 Pac. 1037. See NEW TRIAL.

5. White v. Merrill, 82 Cal. 14, 22 Pac. 1129, per Fox, J.

6. See infra, § 554.

7. Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007.

8. Blum v. Sunol, 63 Cal. 341. See infra, § 547.

9. Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Flood v. Petry, 165 Cal. 309, 46 L. R. A. (N. S.) 861, 132 Pac. 256.

10. Easterling v. Power, 1 Cal. Unrep. 62.

§ 536. Proceedings on Motion for New Trial.—The discretion of a trial court as to the proceedings on a motion for new trial will not be disturbed except for an abuse thereof. The determination of the question whether there has been due diligence in prosecuting a motion for new trial is largely within the discretion of the trial court, and the action of the court in dismissing a motion for new trial on this ground has not been disturbed, unless its discretion has been abused.[11] The terms upon which a court will grant a new trial are peculiarly a matter within its discretion, and wherever the conditions are such that the court is authorized in its discretion to impose terms, the appellate court will interfere only in those cases where it manifestly appears that there has been an abuse thereof;[12] and since it is discretionary with a trial court, in cases in which excessive damages are awarded, and the excess is ascertainable, whether to grant a new trial or direct the excess to be remitted, error cannot be predicated upon the court's refusal to direct such remission.[13]

§ 537. Relieving from Default.—Applications under section 473 of the Code of Civil Procedure to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect are addressed to the discretion of the trial court, and the action of the court thereon will be sustained unless the discretion is palpably and manifestly abused.[14]

11. Dorcy v. Brodis, 153 Cal. 673, 96 Pac. 278; Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831; Hopkins v. Western Pacific R. R. Co., 44 Cal. 389; Boggs v. Clark, 37 Cal. 236; Warden v. Mendocino County, 32 Cal. 655; Eckstein v. Calderwood, 27 Cal. 413; McConnell v. Imperial Water Co., 20 Cal. App. 8, 127 Pac. 1036.

12. Brooks v. San Francisco & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570; Rice v. Gashirie, 13 Cal. 53.

13. Clark v. Huber, 20 Cal. 196.

14. County of Los Angeles v. Lewis, 179 Cal. 398, 177 Pac. 154; Lynn v. Knob Hill Imp. Co., 177 Cal. 56, 169 Pac. 1009; Vinson v. Los Angeles Pacific R. R. Co., 147 Cal. 479, 82 Pac. 53; Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Palace Hardware Co. v. Smith, 134 Cal. 381, 66 Pac. 474; Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619, 61 Pac. 277; Rauer v. Wolf, 115 Cal. 100,

The rule is equally applicable whether the motion is granted or denied,[15] although the appellate court is much more disposed to affirm an order granting such an application as the result is to compel a trial on the merits than it is when the judgment or order is allowed to stand and it appears that a substantial defense can be made.[16] Notwithstanding this inclination of the courts, however, the rule that the trial court, in cases of doubt, should exercise its discretion in favor of the granting the application is a rule merely for the guidance of the trial court. The sole question for the appellate court to determine is whether the trial court abused its discretion in making the order complained of.[17]

46 Pac. 902; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Malone v. Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063; Lodtman v. Schluter, 71 Cal. 94, 16 Pac. 540 (judgment dismissing an action for want of prosecution); Clarke v. Wittram, 4 Cal. Unrep. 65, 33 Pac. 798; Longnecker v. His Creditors, 2 Cal. Unrep. 852, 17 Pac. 220; Southern Pacific R. R. Co. v. White, 2 Cal. Unrep. 151; People v. Seale, 1 Cal. Unrep. 321; Milliken v. Valencia, 31 Cal. App. Dec. 983, 189 Pac. 1049; Banse v. Wells, 30 Cal. App. Dec. 430, 186 Pac. 192; Mercantile Trust Co. v. Stockton Terminal & Eastern R. R. Co., 30 Cal. App. Dec. 190, 185 Pac. 860; Stone v. McWilliams, 30 Cal. App. Dec. 131, 185 Pac. 478; Williams v. Reed, 30 Cal. App. Dec. 89, 185 Pac. 515; Cunnison v. Miller, 34 Cal. App. 267, 167 Pac. 890; Durbrow v. Chesley, 24 Cal. App. 416, 141 Pac. 631; Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014 (discretion held not abused where the proposed answer was evasive and must be construed as an admission of the cause of action); Blumer v. Mayhew, 17 Cal. App. 223, 119 Pac. 202; Curtin v. Dunne, 10 Cal. App. 586, 102 Pac. 825; Younger v. Moore, 8 Cal. App. 237, 96 Pac. 1093; Doherty v. California Nav. & Imp. Co., 6 Cal. App. 131, 91 Pac. 419; Freeman v. Brown, 5 Cal. App. 516, 90 Pac. 970; Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 84 Pac. 425; Murphy v. Stelling, 1 Cal. App. 95, 81 Pac. 730.

15. Moore v. Thompson, 138 Cal. 23, 70 Pac. 930.

16. County of Los Angeles v. Lewis, 179 Cal. 398, 177 Pac. 154; Haviland v. Southern California Edison Co., 172 Cal. 601, 158 Pac. 328; O'Brien v. Leach, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004; Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Banse v. Wells, 30 Cal. App. Dec. 430, 186 Pac. 192; Durbrow v. Chesley, 24 Cal. App. 416, 141 Pac. 631.

17. Utah Nevada Co. v. DeLamar, 9 Cal. App. 759, 100 Pac. 884; Blumer v. Mayhew, 17 Cal. App. 223, 119 Pac. 202.

§ 538. **Appeal.**—The determination whether there has been due diligence in taking the necessary steps under section 953a of the Code to secure the filing of a transcript is within the discretion of the trial court, and its action will not be disturbed by the appellate court unless its discretion is abused; and especially will its action be sustained when it tends to a determination of the appeal upon its merits.[18]

Relieving default in presenting bill or statement.—The granting or denial of relief from a noncompliance with the law in the matter of the presentation of a proposed bill of exceptions (or, under the former practice, a statement) on motion for new trial rests largely in the discretion of the trial court, and its action will not be disturbed in the absence of a manifest abuse of discretion.[19]

V. QUESTIONS OF LAW AND FACT.

Introductory.

§ 539. **Authority to Review Questions of Fact.**—It is the province of an appellate court to decide questions of law,[20] to review the action of the court below and correct its errors.[1] An appellate court possesses none of the functions of a jury, and cannot assume to exercise them.[2] While the question of the sufficiency of the evi-

18. Smith v. Jaccard, 20 Cal. App. 280, 128 Pac. 1023, 1026.

19. Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Howell v. Pedersen, 41 Cal. App. 45, 181 Pac. 674; Sheehy v. Minaker, 16 Cal. App. 437, 117 Pac. 616; Utah-Nevada Co. v. De Lamar, 9 Cal. App. 759, 100 Pac. 884; Freeman v. Brown, 5 Cal. App. 516, 90 Pac. 970; Miller v. American Central Ins. Co., 2 Cal. App. 271, 83 Pac. 289.

20. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Bauder v. Tyrrel, 59 Cal. 99; Visscher v. Dixon, 31 Cal. App. Dec. 539, 188 Pac. 1029.

1. Sutter v. San Francisco, 36 Cal. 112.

2. Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; Talcott Land Co. v. Hirshiser, 30 Cal. App. Dec. 586.

dence, as a matter of law, to support a verdict or finding may be presented to the appellate court for review, its duty stops when it has determined that there is some substantial evidence to support it. It will not weigh the evidence,[3] pass upon the credibility of witnesses,[4] nor substitute its judgment thereon for that of the trial court, but will uphold the verdict or finding,[5] even though it would have decided otherwise if it had occupied the place of the trial judge or jury.[6]

Effect of constitutional provision.—The section of the constitution forbidding the reversal of a judgment on certain grounds, unless after an examination of the entire cause, including the evidence, "the court shall be of the opinion that the error complained of resulted in a miscarriage of justice," does not require the court to review the evidence with a view of determining where the preponderance or the weight of the evidence, lies. This provision, so far as appellate courts are concerned, authorizes the review or examination of the evidence, not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies, but only for the purpose of determining whether the court may be required to hold that from any error in the misdirection of the jury, or in the admission or exclusion of evidence, or as to any matter of pleading or procedure, a miscarriage of justice has resulted.[7] Of course, where the testimony upon which a verdict or finding is based is characterized by such inherent weakness as to justify the conclusion that it is insufficient to uphold the verdict or the findings, then a question of law arises, in which

3. See infra, § 550.
4. See infra, § 541.
5. Estate of Scott, 128 Cal. 57, 60 Pac. 527.
6. See infra, § 543.
7. Snyder v. Miller, 29 Cal. App. 566, 157 Pac. 22, explaining Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. See infra, § 597.

case, as in the case of any other question of law, an appellate court may review it.[8]

§ 540. Power to Make Findings and Draw Inferences. The act of drawing a conclusion from the evidence is peculiarly the function of the trial court, and an appellate court in the exercise of its appellate jurisdiction has power to correct only errors of law and cannot correct errors of fact committed by the trial court.[9] An appellate court cannot, therefore, determine questions of fact and make findings of fact, although the entire evidence is before it,[10] and although the evidence is clear and convincing.[11] It cannot correct a finding of a trial court even though it is undoubted that the defect therein was inadvertent.[12]

Drawing inferences.—For the same reason, an appellate court cannot draw inferences of fact from the facts

8. Snyder v. Miller, 29 Cal. App. 566, 157 Pac. 22.

9. Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516.

10. Lauman v. Concordia Fire Ins. Co., 32 Cal. App. Dec. 850, 192 Pac. 128; Blair v. Brownstone Oil & Ref. Co., 168 Cal. 632, 143 Pac. 1022; Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Estate of Moore, 162 Cal. 324, 122 Pac. 844; Matter of Ogden, 153 Cal. 347, 95 Pac. 161; Di Nola v. Allison, 143 Cal. 106, 65 L. R. A. 419, 76 Pac. 976; Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 Pac. 915; Bank of British Columbia v. Frese, 116 Cal. 9, 47 Pac. 783; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249, 681; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Chandler v. People's Sav. Bank, 65 Cal. 498, 4 Pac. 502; Coveny v. Hale, 49 Cal. 552; Estate of Bowen, 34 Cal. 682; Carpentier v. Gardiner, 29 Cal. 160; McCartney v. Fitz Henry, 16 Cal. 184; Guy v. Leech, 32 Cal. App. Dec. 361, 190 Pac. 1067; Lawrence v. Goodwill, 30 Cal. App. Dec. 637, 186 Pac. 781; Collins v. Ramish, 28 Cal. App. Dec. 1065; O'Reilly v. All Persons, 29 Cal. App. 49, 154 Pac. 474; Needels v. Coffee, 22 Cal. App. 99, 133 Pac. 491 (even though the failure to make a finding is the result of carelessness or indifference, the appellate court cannot incorporate in the findings a material fact not found by the trial court); Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516.

11. Katschinski v. Keller, 33 Cal. App. Dec. 257, 193 Pac. 587.

12. Johnstone v. Gloster, 33 Cal. App. Dec. 464, 194 Pac. 504.

found or find an ultimate fact from probative facts unless it follows as a conclusion of law.[13] If the trial court failed to make a finding as to an ultimate fact, the appellate court cannot infer the fact from the facts found, but must reverse the judgment for want of findings unless such ultimate fact necessarily results from the facts found or follows therefrom as a matter of law;[14] that is to say, when the nonexistence of the fact to be inferred, upon every conceivable theory of which the case will admit, is inconsistent with the existence of the facts which are found.[15] Not only is the appellate court itself precluded from inferring the fact in such case, but it is also precluded from directing the trial court to make a finding,[16] and from modifying a judgment where the judgment as modified would not be supported by the findings made and would necessitate the appellate court making other findings.[17]

§ 541. Illustrations of Questions of Law and Fact— *Qualification of jurors.*—Whether a prospective juror is

13. Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Bull v. Bray, 89 Cal. 286, 26 Pac. 873; Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; De Celis v. Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120 (on petition for rehearing); Poorman v. D. O. Mills & Co., 43 Cal. 323; Sneed v. Osborn, 25 Cal. 619 (on rehearing). If the appellate court should assume or infer any fact from the findings, it would be trespassing on the exclusive province of the trial court by finding facts and converting itself into a tribunal of original jurisdiction in direct violation of law. Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104.

14. Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799; Bull v. Bray, 89 Cal. 286, 26 Pac. 873; Oneto v. Restano, 78 Cal. 374, 20 Pac. 743 (findings of probative facts are not sufficient unless the ultimate fact necessarily results from the facts found); De Celis v. Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120 (on petition for rehearing); Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516.

15. Oneto v. Restano, 78 Cal. 374, 20 Pac. 743; Emmal v. Webb, 36 Cal. 197.

16. Hyman v. Karl Stern Co., 32 Cal. App. Dec. 314, 191 Pac. 47.

17. Lauman v. Concordia Fire Ins. Co., 32 Cal. App. Dec. 850, 192 Pac. 128 (where a finding of a lump sum was erroneous in part); Hyman v. Karl Stern Co., 32 Cal. App. Dec. 314, 191 Pac. 47. See infra, § 582.

fair and impartial and should be allowed to sit in a cause is a mixed question of law and fact, and the determination of that question against the challenge will be interfered with upon appeal only when the evidence adduced on the voir dire is of such a character that it can be said from it, as a matter of law, that the juror is so prejudiced or biased in the case that he will not be a fair juror.[18] The case must be one in which it is manifest that the law left nothing to the conscience or discretion of the court.[19] A ruling in allowing a challenge will not be reviewed unless it is clearly made to appear that prejudice resulted.[20]

Credibility of witnesses.—The amount of credit to be given to the positive testimony of a witness is solely a question for the trial tribunal,[1] except, perhaps, where the testimony, in the light of the undisputed facts, is inherently so improbable and impossible of belief as to, in effect, constitute no evidence at all.[2]

Amount of recovery.—The amount of recovery is a question of fact to be determined by the jury, and an appellate court is without authority to disturb the verdict

18. Burns v. Dunham, Carrigan & Hayden Co., 148 Cal. 208, 82 Pac. 959; Graybill v. De Young, 146 Cal. 421, 80 Pac. 618; Baker v. Borello, 136 Cal. 160, 68 Pac. 591; Trenor v. Central Pacific R. R. Co., 50 Cal. 222 (the question presented is a question of fact); Eaton v. Southern Pacific Co., 22 Cal. App. 461, 134 Pac. 801; People v. Hill, 20 Cal. App. 407, 129 Pac. 475. See JURY.

19. County of Mono v. Flanigan, 130 Cal. 105, 62 Pac. 293.

20. Lawlor v. Linforth, 72 Cal. 205, 13 Pac. 496; Grady v. Early, 18 Cal. 108; McKernan v. Los Angeles Gas & E. Co., 16 Cal. App. 280, 116 Pac. 677.

1. Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Henry v. Phillips, 163 Cal. 135, Ann. Cas. 1914A, 39, 124 Pac. 837; De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059; Jarnatt v. Cooper, 59 Cal. 703; Sterling v. Cole, 12 Cal. App. 93, 106 Pac. 602; Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93; De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 Pac. 397; Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515.

2. Crow v. Crow, 168 Cal. 607, 143 Pac. 689; De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059; Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93. See infra, § 550.

if there is any substantial evidence in support of it.[3] Before an appellate court can interfere on the ground of excessive damages, the excess must appear as a matter of law, or be such as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.[4] Practically the trial court must bear the whole responsibility in every case. But if the amount of the damages is so obviously disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict must be held excessive.[5]

Nonsuit.—An order granting or denying a nonsuit may be reviewed on appeal as an error of law.[6]

3. Bartlett v. Hogden, 3 Cal. 55. See DAMAGES.

4. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223 (holding a verdict of five thousand dollars in an action for damages for the death of a child is not within the rule); Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234; Nolen v. F. O. Engstrum Co., 175 Cal. 464, 166 Pac. 346; Price v. Northern Electric Ry. Co., 168 Cal. 173, 142 Pac. 91; Nelson v. Kellogg, 162 Cal. 621, Ann. Cas. 1913D, 759, 123 Pac. 1115; Bond v. United Railroads, 159 Cal. 270, Ann. Cas. 1912C, 50, 48 L. R. A. (N. S.) 687, 113 Pac. 366; Shaw v. Southern Pac. R. R. Co., 157 Cal. 240, 107 Pac. 108; Kimic v. San Jose-Los Gatos I. R. Co., 156 Cal. 273, 104 Pac. 312; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; Clare v. Sacramento Electric P. & L. Co., 122 Cal. 504, 55 Pac. 326; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 42 Pac. 983; Lee v. Southern P. R. R. Co, 101 Cal. 118, 35 Pac. 572; Morgan v. Southern Pac. Co., 95 Cal. 501, 30 Pac. 601; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Wilson v. Fitch, 41 Cal. 363; Boyce v. California Stage Co., 25 Cal. 460; Aldrich v. Palmer, 24 Cal. 513; Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43; Williams v. A. R. G. Bus Co., 32 Cal. App. Dec. 280, 190 Pac. 1036; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90; McGrory v. Pacific Electric Ry. Co., 22 Cal. App. 671, 136 Pac. 303.

5. Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234 (holding a verdict of ten thousand dollars for death of child excessive). See DAMAGES.

6. Carter v. Canty, 181 Cal. 749, 186 Pac. 346; Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701; Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870. See supra, § 506, as to presumptions and review of evidence. See DISMISSAL, DISCONTINUANCE AND NONSUIT.

Verdict and Findings.

§ 542. Sufficiency of Evidence.—While an appellant may present to an appellate court the question whether there is any sufficient evidence to support a general verdict or finding,[7] appellate courts sit to review errors of law, and are without power to make findings of fact, and it is only when the question is presented as one of law that the appellate court will examine it to this sole end. And when it is satisfied that substantial evidence exists to support the verdict or finding, its examination ceases at once.[8] It must be borne in mind, says Mr. Justice Angellotti, in a recent case, that the question before the court in considering the attack on the verdict of the jury is not how it would find the facts to be, but whether there was enough in the evidence from which the jury might find the existence of facts which would justify the verdict they rendered. Was there substantial evidence in support thereof? If so, the verdict must stand, however strongly such evidence may be opposed to other evidence given on the trial. In cases of mere conflict of evidence the conclusions of the trial jury and judge are conclusive on the question as to which side produced the preponderance of evidence.[9]

To render a verdict or make a finding upon an issue upon which there is a total want of evidence is an error at law which may be reviewed upon appeal.[10] The jurisdiction of the appellate court, however, is not confined to cases in which there is no evidence of a material fact, but includes those cases also in which there is some evi-

7. Garwood v. Scheiber, 246 Fed. 74, 158 C. C. A. 300.

8. Estate of Moore, 162 Cal. 324, 122 Pac. 844.

9. Still v. San Francisco & N. W. Ry. Co., 154 Cal. 559, 129 Am. St. Rep. 177, 20 L. R. A. (N. S.) 322, 98 Pac. 672.

10. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Domico v. Cassassa, 101 Cal. 411, 35 Pac. 1024; Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. 838; Driscoll v. Market Street Cable Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591.

dence but not enough to sustain the verdict.[11] An appellate court, therefore, can set aside a verdict or finding for want of evidence when there is no evidence to support it, or when the supporting evidence is so weak as to show an abuse of discretion, and in these cases only.[12] The rule is equally applicable to the verdict of a jury and to the findings of a court sitting as a jury,[13] and to verdicts on the first trial or upon successive trials.[14]

This rule has been variously expressed in the cases. For example, it has been said that it is only in cases where there is no evidence to sustain a finding or where it can be said as a matter of law that the evidence is insufficient to sustain it that the appellate court can consider the evidence.[15] Again, it has been held that whether or not the evidence is insufficient to sustain a decision of a court is a question which will not be looked into on appeal further than to see if there is some evidence tending to support it.[16] So, also, it has been held that a verdict or finding will not be disturbed if it is supported by some evidence,[17] by any evidence,[18] by slight

11. People v. Jones, 31 Cal. 565 (per Sanderson, J.).

12. Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892, on rehearing (to justify a reversal on the ground of the insufficiency of the evidence to sustain the findings, the record evidence must be such as to clearly warrant the appellate court in declaring, as a matter of law, that it is too weak to support the findings).

13. Estate of Scott, 128 Cal. 57, 60 Pac. 527; Hoppe v. Robb, 1 Cal. 373.

14. Hogan v. Titlow, 14 Cal. 255; Allen v. McKay & Co., 6 Cal. Unrep. 993, 70 Pac. 8 (opinion in department).

15. Thom v. Stewart, 162 Cal. 413, 122 Pac. 1069; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Spreckels v. State, 30 Cal. App. 363, 158 Pac. 549. See White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Cummins v. Scott, 20 Cal. 83; Potter v. Carney, 8 Cal. 574; Leach v. California Safe Deposit & Trust Co., 6 Cal. Unrep. 822, 66 Pac. 786, to the same effect.

16. Larco v. Roeding, 1 Cal. Unrep. 438.

17. Stockton Combined Harvester & A. Wks. v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Barry v. Coughlin, 90 Cal. 220, 27 Pac. 197; Lick v. Madden, 36 Cal. 208, 95 Am. Dec. 175; Algier v. Steamer Maria, 14 Cal. 167; Kaufmann v. New York Life Ins. Co., 30 Cal. App. Dec. 536, 186 Pac. 360.

18. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Meyer v. Great West-

evidence,[19] by substantial evidence,[20] by clear and substantial evidence,[1] by sufficient evidence,[2] by any reasonable amount of evidence,[3] or if supported by evidence which is not upon its face or inherently improbable and unbelievable.[4] So, also, it has been said that the finding of a trial court upon an issue of fact is conclusive on appeal unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, the appellate court can say that the conclusion is without substantial support in the record.[5]

Where evidence is required to be clear and satisfactory. This rule is applicable also where the evidence to prove

ern Ins. Co., 104 Cal. 381, 38 Pac. 82; Estate of Rose, 80 Cal. 166, 22 Pac. 86; Hogan v. Titlow, 14 Cal. 255; Pfeiffer v. Riehn, 13 Cal. 643; Pincus v. Aaron, 1 Cal. Unrep. 468.

19. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Lassing v. Paige, 56 Cal. 139 (the findings upon questions of fact cannot be disturbed on appeal, unless the evidence in support of them is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the court); MacDonald v. MacDonald, 155 Cal. 665, 25 L. R. A. (N. S.) 45, 102 Pac. 927; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298.

20. Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818, 19 Pac. 512; Still v. San Francisco & N. W. Ry. Co., 154 Cal. 559, 129 Am. St. Rep. 177, 20 L. R. A. (N. S.) 322, 98 Pac. 672; Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93; Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; Frederick v. San Francisco O. T. Rys., 32 Cal. App. Dec. 677, 191 Pac. 1020; Stewart v. San Joaquin Light & Power Co., 30 Cal. App. Dec. 460, 186 Pac. 160; Imperial Valley Mercantile Co. v. Southern Pacific Co., 15 Cal. App. 385, 114 Pac. 1003.

1. Wolf v. Gall, 176 Cal. 787, 169 Pac. 1017 ("Our province as a court of review is ended when it is shown that there is clear and substantial evidence to support a finding").

2. Stockman v. Riverside Land & Irr. Co., 64 Cal. 57, 28 Pac. 116; Gregory v. Haynes, 1 Cal. Unrep. 83; Koehl v. Carpenter, 32 Cal. App. Dec. 331, 191 Pac. 43.

3. Estate of Wikman, 148 Cal. 642, 84 Pac. 212.

4. Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 112 Pac. 564.

5. Hassell v. Bunge, 167 Cal. 365, 139 Pac. 800; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275 (in all matters in which the conclusion of the trial court rests upon the weight of evidence, its conclusion is not reviewable by the appellate court); Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023 ("Unless manifestly without sufficient support in the evidence").

a particular matter is required by law to be clear, satisfactory and convincing. Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by the appellate court as conclusive, if there be substantial evidence to support it.[6]

§ 543. Upon Conflicting Evidence.—A judgment cannot be reversed because the evidence is conflicting.[7] On the contrary, the rule is established by a host of decisions that an appellate court will not disturb a verdict of a jury or findings of a court when there is a substantial conflict of evidence on material points and when there is some evidence to support the verdict or findings.[8]

6. Steinberger v. Young, 175 Cal. 81, 165 Pac. 432; Estate of Pepper, 158 Cal. 619, 31 L. R. A. (N. S.) 1092, 112 Pac. 62; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Couts v. Winston, 153 Cal. 686, 96 Pac. 357; Harris v. Harris, 136 Cal. 379, 69 Pac. 23; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Jarnatt v. Cooper, 59 Cal. 703.

7. Dashiell v. Slingerland, 60 Cal. 653; Fisher v. Frank, 8 Cal. App. 472, 97 Pac. 95.

8. Union Hollywood Water Co. v. City of Los Angeles, 60 Cal. Dec. 701, 195 Pac. 55; Robinson v. Western States G. & E. Co., 60 Cal. Dec. 620, 194 Pac. 39; Adkins v. Brett, 60 Cal. Dec. 515, 193 Pac. 251; Rolland v. Porterfield, 60 Cal. Dec. 159, 191 Pac. 913; Smith v. Royer, 181 Cal. 165, 183 Pac. 660; Baillargeon v. Myers, 180 Cal. 504, 182 Pac. 37; San Diego v. Hall, 180 Cal. 165, 179 Pac. 889; Holcomb v. Breitkreutz, 180 Cal. 17, 179 Pac. 162; Estate of Ross, 179 Cal. 629, 178 Pac. 510; Michelin Fire Co. v. Coleman & Bentel Co., 179 Cal. 598, 178 Pac. 507; Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679 (in case of a conflict, it is not for this court to review the conclusion reached by the jury, if there is any rational basis for the verdict); Lamberson v. Bashore, 178 Cal. 321, 173 Pac. 401; Estate of Jepson, 178 Cal. 257, 172 Pac. 1107; Citizens' Trust & Savings Bank v. Tuffree, 178 Cal. 185, 172 Pac. 586; Levi v. Chesley, 178 Cal. 145, 172 Pac. 607 (replevin suit); Sharpless v. Pantages, 178 Cal. 122, 172 Pac. 384; McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355; Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 Pac. 687; Smalley v. George C. Peckham Co., 175 Cal. 146, 165 Pac. 438; Del Monte Ranch Dairy v. Bernardo, 174 Cal. 757, 164 Pac. 628 (evidence as to existence of contract); Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645; Estate of Ross, 171 Cal. 64, 151 Pac. 1138; Crow v. Crow, 168 Cal. 607, 143 Pac. 689; Las Palmas Winery & Distillery v.

The expression that an appellate court will not look into the evidence, if it is conflicting, for the purpose of determining whether the verdict ought to stand, though

Garrett & Co., 167 Cal. 397, 139 Pac. 1077; Gallatin v. Corning Irr. Co., 163 Cal. 405, Ann. Cas. 1914A, 74, 126 Pac. 864; Thom v. Stewart, 162 Cal. 413, 122 Pac. 1069; Estate of Moore, 162 Cal. 324, 122 Pac. 844 (the rule is not a court-made rule); Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695; Bradley v. Davis, 156 Cal. 267, 104 Pac. 302; Wyatt v. Pacific Electric Ry. Co., 156 Cal. 170, 103 Pac. 892; City of Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914; Ernest v. McCauley, 155 Cal. 739, 102 Pac. 924; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176; Still v. San Francisco & N. W. Ry. Co., 154 Cal. 559, 129 Am. St. Rep. 177, 20 L. R. A. (N. S.) 322, 98 Pac. 672 (in cases of mere conflict of evidence, the conclusions of the trial jury and judge are conclusive on the question as to which side produced the preponderance of evidence); Laurence v. Kilgore, 154 Cal. 310, 97 Pac. 760; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316; Schell v. Gamble, 153 Cal. 448, 95 Pac. 870; Davis v. Davis, 151 Cal. 548, 91 Pac. 485; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276; Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93; Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162; Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507; Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 Pac. 178; Emerson v. Yosemite Gold Min. & Milling Co., 149 Cal. 50, 85 Pac. 122; Raymond v. Glover, 144 Cal. 548, 78 Pac. 3; Id., 122 Cal. 471, 55 Pac. 398; Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 Pac. 1124; Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; Durfee v. Seale, 139 Cal. 693, 73 Pac. 435; Humboldt Savings & Loan Society v. Dowd, 137 Cal. 408, 70 Pac. 274; Baker v. Borello, 136 Cal. 160, 68 Pac. 591; Peters v. McKay & Co., 136 Cal. 73, 68 Pac. 478; Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091; Rawlins v. Ferguson, 133 Cal. 470, 65 Pac. 957; Baum v. Roper, 132 Cal. 42, 64 Pac. 128; Woods v. Jensen, 130 Cal. 200, 62 Pac. 473; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Knight v. Whitmore, 125 Cal. 198, 57 Pac. 891; Britton v. Oakland Bank of Savings, 124 Cal. 282, 17 Am. St. Rep. 58, 57 Pac. 84; De Jarnatt v. Peake, 123 Cal. 607, 56 Pac. 467; Whyte v. Rosencrantz, 123 Cal. 634, 69 Am. St. Rep. 90, 56 Pac. 436; Barker v. Gould, 122 Cal. 240, 54 Pac. 845; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Blair v. Blair, 122 Cal. 57, 54 Pac. 369 (evidence as to cruelty in a divorce action); Stockton Combined Harvester & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Citizens' Bank v. Jones, 121 Cal. 30, 53 Pac. 354; Murray v. Tulare Irr. Co., 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; County of Inyo v. Erro, 119 Cal. 119, 51 Pac. 32 (finding as to intent); Malone v. Roy, 118 Cal. 512, 50 Pac. 542; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Warner v. Southern

common, is not very exact. On the contrary, whenever the point is made that the verdict or findings are not supported by the evidence, the court does look into the evi-

Pacific Co., 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187; Grunsky v. Parlin, 110 Cal. 179, 42 Pac. 575; Sherman v. Sandall, 106 Cal. 373, 39 Pac. 797; Gardner v. Dennison, 106 Cal. 190, 39 Pac. 526; Mahan v. Wood, 105 Cal. 12, 38 Pac. 507; Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Lynn v. Southern Pacific Co., 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018; Nichol v. Laumeister, 102 Cal. 658, 36 Pac. 925; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Abbott v. Seventy-Six Land & Water Co., 101 Cal. 567, 36 Pac. 1; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92; Commissioners v. Barnard, 98 Cal. 199, 32 Pac. 982; Driscoll v. Market St. Cable Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569 (evidence of negligence); Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. 838; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Welch v. Mohr, 93 Cal. 371, 28 Pac. 1060 (evidence as to place to which a horse was to be driven); Hoyt v. Selby Smelting & Lead Co., 90 Cal. 339, 27 Pac. 288; Storch v. McCain, 85 Cal. 304, 24 Pac. 639; Ipswitch v. Fernandez, 84 Cal. 639, 24 Pac. 298; Crawford v. Independent Stove Pipe Works, 83 Cal. 629, 24 Pac. 836; Norton v. Sturla, 83 Cal. 559, 23 Pac. 527; McLain v. Baker, 82 Cal. 529, 22 Pac. 1084; Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134; Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Anderson v. Black, 70 Cal. 226, 11 Pac. 700; Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Stuart v. Hoffman, 68 Cal. 381, 9 Pac. 451; Gonzales v. Cobliner, 68 Cal. 151, 8 Pac. 697; Hildreth v. White, 66 Cal. 549, 6 Pac. 454; Stockman v. Riverside Land & Irr. Co., 64 Cal. 57, 28 Pac. 116; Tilden v. Saucelito Land & Ferry Co., 61 Cal. 610 (as to employment of plaintiff); Jarnatt v. Cooper, 59 Cal. 703; Clark v. His Creditors, 57 Cal. 639; McCourtney v. Fortune, 57 Cal. 617; Witherby v. Thomas, 55 Cal. 9; Fitzgerald v. Union Ins. Co., 54 Cal. 599; Northern Pacific R. R. Co. v. Reynolds, 50 Cal. 90; Roper v. McFadden, 48 Cal. 346; Goodrich v. Van Landigham, 46 Cal. 601; Mills v. Lux, 45 Cal. 273; Gale v. Tuolumne County Water Co., 44 Cal. 43; Livermore v. Stine, 43 Cal. 274; Woods v. Whitney, 42 Cal. 358; Phelps v. McGloan, 42 Cal. 298; Child v. Hugg, 41 Cal. 519; Wilson v. Fitch, 41 Cal. 363; Hawkins v. Abbott, 40 Cal. 639; Reed v. Bernal, 40 Cal. 628; Carroll v. City of Benicia, 40 Cal. 386; Frost v. Harford, 40 Cal. 165; Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209; Satterlee v. Bliss, 36 Cal. 489; Lick v. Madden, 36 Cal. 208, 95 Am. Dec. 175; Putnam v. Lamphier, 36 Cal. 151 (the application of the rule depends in no measure upon the question whether any of the

dence, and determines whether the evidence is substantially conflicting. And if, upon a careful examination, it appears that there is a substantial conflict, in view of

witnesses are interested in the event of the suit. The credit to be given to their testimony, however attacked, must be determined in the court below); King v. Meyer, 35 Cal. 646; Pralus v. Pacific Gold & S. Min. Co., 35 Cal. 30; Smith v. Athern, 34 Cal. 506; Wilson v. Cross & Co., 33 Cal. 60; Wilkinson v. Parrott, 32 Cal. 102; Rice v. Cunningham, 29 Cal. 492; Coleman v. Woodworth, 28 Cal. 567; Harper v. Minor, 27 Cal. 107; Hurlburt v. Jones, 25 Cal. 225; Tebbs v. Weatherwax, 23 Cal. 58; Cummins v. Scott, 20 Cal. 83; Baker v. Joseph, 16 Cal. 173; Davis v. Smith, 2 Cal. 423; Griswold v. Sharpe, 2 Cal. 17; Hoppe v. Robb, 1 Cal. 373; Johnson v. Pendleton, 1 Cal. 132; Showers v. Zanone, 7 Cal. Unrep. 263, 85 Pac. 857; Springer v. Springer, 6 Cal. Unrep. 662, 64 Pac. 470; Ramsbottom v. Fitzgerald, 5 Cal. Unrep. 941, 52 Pac. 149; Connolly v. Wicks, 5 Cal. Unrep. 867, 51 Pac. 37; McKenzie v. Joost, 5 Cal. Unrep. 430, 45 Pac. 1056; Oullahan v. Baldwin, 5 Cal. Unrep. 423, 45 Pac. 1032; People's Ditch Co. v. Seventy-Six Land & Water Co., 5 Cal. Unrep. 292, 44 Pac. 176; McGee v. San Francisco & N. P. Ry. Co., 5 Cal. Unrep. 285, 43 Pac. 1106; Smith v. Sabin, 5 Cal. Unrep. 254, 43 Pac. 588; Fogel v. San Francisco & San Mateo Ry. Co., 5 Cal. Unrep. 194, 42 Pac. 565; Woodbridge v. World Pub. Co., 5 Cal. Unrep. 26, 40 Pac. 231; McVey v. Beam, 4 Cal. Unrep. 908, 38 Pac. 515; Shamp v. White, 106 Cal. 220, 39 Pac. 537; Johnson v. Greenberg, 4 Cal. Unrep. 687, 37 Pac. 141; Christensen v. McBride, 4 Cal. Unrep. 542, 36 Pac. 398; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516; Hogan v. Burns, 4 Cal. Unrep. 62, 33 Pac. 631; Young v. Donegan, 3 Cal. Unrep. 486, 29 Pac. 412; Cross v. Reed, 3 Cal. Unrep. 484, 29 Pac. 244; Castagnino v. Balletta, 3 Cal. Unrep. 107, 21 Pac. 1097; Partridge v. Owens, 2 Cal. Unrep. 756, 13 Pac. 856; Cohen v. Mitchell, 2 Cal. Unrep. 629, 9 Pac. 649; Peterson v. Doe, 2 Cal. Unrep. 587, 8 Pac. 834; Whitesides v. Briggs, 2 Cal. Unrep. 529, 7 Pac. 836; Damsguard v. Gunnoldson, 2 Cal. Unrep. 512, 7 Pac. 772; Moore v. Moore, 2 Cal. Unrep. 510, 7 Pac. 688; Haley v. Shepherd, 2 Cal. Unrep. 509, 7 Pac. 635; Hogan v. Tyler, 2 Cal. Unrep. 489, 7 Pac. 454; Hughes v. Parsons, 2 Cal. Unrep. 451, 6 Pac. 380; Farnsworth v. Wixom, 2 Cal. Unrep. 435, 5 Pac. 506; Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300; Carroll v. Belden, 2 Cal. Unrep. 205; Wheeler v. Turner, 1 Cal. Unrep. 798 (a judgment without findings will not be disturbed on the ground that the evidence is insufficient to justify it, if there is a manifest conflict in the evidence); Coulthirst v. Kelley, 1 Cal. Unrep. 796; Pincus v. Aaron, 1 Cal. Unrep. 468; Dorlan v. San Francisco & San Jose R. R. Co., 1 Cal. Unrep. 457; Hodges v. Cushing, 1 Cal. Unrep. 450; Ruffatt v. Cashman, 1 Cal. Unrep. 449; Elias v. Verdugo, 1 Cal. Unrep. 333; Shipley v. Larrimore, 1 Cal. Unrep. 297; Kellogg v. Crippen, 1 Cal. Unrep. 161; Donaldson v. Neville, 1 Cal. Unrep.

which, as presented to the appellate court, the jury might find either way without becoming obnoxious to the charge of passion, prejudice, misconception or caprice, the ver-

124; Lawson v. McGee, 1 Cal. Unrep. 19; Native American Min. Co. v. Lockwood, 1 Cal. Unrep. 5; Flint v. Gugiere, 33 Cal. App. Dec. 724, 195 Pac. 85; Curtin v. Moran & Co., 33 Cal. App. Dec. 628, 194 Pac. 1049; Commercial Nat. Bank v. Roberts, 33 Cal. App. Dec. 477, 194 Pac. 751; Hobson v. Silvea, 33 Cal. App. Dec. 510, 194 Pac. 525; Cole v. Bux, 33 Cal. App. Dec. 442, 194 Pac. 71 (action for labor performed); Maginnis v. Hurlbutt, 33 Cal. App. Dec. 284, 193 Pac. 606; Azevedo v. Davidson, 33 Cal. App. Dec. 279, 193 Pac. 594; Konig v. Lyon, 33 Cal. App. Dec. 67, 192 Pac. 875 (personal injury action); MacFarlane v. Doyle, 32 Cal. App. Dec. 1101, 192 Pac. 462; Pleasants v. Hanson, 32 Cal. App. Dec. 916, 192 Pac. 183; Jordan v. Alderson, 32 Cal. App. Dec. 826, 192 Pac. 170; Krogh Mfg. Co. v. Churchill, 32 Cal. App. Dec. 393, 191 Pac. 74; Hyman v. Karl Stern Co., 32 Cal. App. Dec. 314, 191 Pac. 47; Mortgage Securities Co. v. Pfaffman, 32 Cal. App. Dec. 167, 190 Pac. 641; De Ville v. De Ville, 31 Cal. App. Dec. 700, 189 Pac. 297; Visscher v. Dixon, 31 Cal. App. Dec. 539, 188 Pac. 1029; Wallace v. Fresno Canal & Land Corp., 30 Cal. App. Dec. 778, 186 Pac. 830; Ward v. Gildea, 30 Cal. App. Dec. 565, 186 Pac. 612; Ward v. Andrews, 30 Cal. App. Dec. 602, 186 Pac. 605; Mott v. Wright, 30 Cal. App. 36, 184 Pac. 517; Nadeau v. Lynch, 41 Cal. App. 755, 183 Pac. 278 (order refusing to set aside a judgment on account of mistake, inadvertence, surprise or excusable neglect); Pozzi v. Alpine Evaporated Cream Co., 40 Cal. App. 597, 181 Pac. 69; Harms v. Grant, 39 Cal. App. 372, 178 Pac. 968; Gulick v. E. Clemens Horst Co., 39 Cal. App. 376, 178 Pac. 968; Fischer v. Hayes, 39 Cal. App. 367, 178 Pac. 967; Frazee v. Fox Film Corp., 31 Cal. App. Dec. 322, 188 Pac. 286 (as to employment of plaintiff); Tower v. Wilson, 30 Cal. App. Dec. 965, 188 Pac. 87; McDuff v. McDuff, 30 Cal. App. Dec. 901, 187 Pac. 37; McNett v. McNett, 30 Cal. App. Dec. 859, 187 Pac. 447 (divorce action); Fawcett v. Edmund Peycke Co., 30 Cal. App. Dec. 735, 187 Pac. 39; Mann v. Dettling, 30 Cal. App. Dec. 668, 186 Pac. 603; In re Bundy, 30 Cal. App. Dec. 661, 186 Pac. 811; Ford v. Ford, 30 Cal. App. Dec. 611, 186 Pac. 164; Doyle v. Doyle, 30 Cal. App. Dec. 497, 186 Pac. 188 (finding as to duress in execution of a promissory note); Hoffman v. Gurnsey, 30 Cal. App. Dec. 384, 185 Pac. 993 (as to what was the contract between the parties); Umstead v. Automobile Funding Co., 30 Cal. App. Dec. 352, 185 Pac. 1011; Simpson v. Malter, 30 Cal. App. Dec. 227, 185 Pac. 675; Matter of King, 29 Cal. App. Dec. 825, 184 Pac. 964; Camp v. Boyd, 41 Cal. App. 83, 182 Pac. 60; Palo Alto Mutual B. & Loan Assn. v. Mullen, 40 Cal. App. 197, 180 Pac. 541; Jones v. International Indemnity Co., 39 Cal. App. 706, 179 Pac. 692; Fischer v. Hayes, 39 Cal. App. 367, 178 Pac. 967; Lombardi v. Kalloch, 34 Cal. App. 698, 168 Pac. 698; Blanc v. De Latour, 34

dict will not be disturbed.[9] Where the testimony is substantially conflicting, the appellate court in support of the decision or verdict will assume the testimony of the prevailing party to be true, and construe it as favorably as possible in his favor.[10] It will not disturb the verdict or the findings, even though it would have found the other way, had it occupied the place of the trial judge or jury,[11] and even though it is not satisfied with the verdict or the findings,[12] or is of the opinion that the verdict or finding is against the weight of evidence.[13] It is not sufficient,

Cal. App. 512, 168 Pac. 141; Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 Pac. 342; Hughes v. Chung Sun Tung Co., 28 Cal. App. 371, 154 Pac. 299, 301; California Real Estate Co. v. Walkup, 27 Cal. App. 441, 150 Pac. 385; Berman v. Rutley, 27 Cal. App. 67, 148 Pac. 693; Baucom v. Baucom, 25 Cal. App. 108, 142 Pac. 902; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769; Atkinson v. Golden Gate Tiling Co., 21 Cal. App. 168, 131 Pac. 107; Johnston v. Porter, 21 Cal. App. 97, 131 Pac. 69; Doudell v. Shoo, 20 Cal. App. 424, 448, 129 Pac. 478; Parker v. Herndon, 19 Cal. App. 451, 126 Pac. 183; Kinsell v. Thomas, 18 Cal. App. 683, 124 Pac. 220; Thorpe v. North Moneta Garden Lands Water Co., 12 Cal. App. 186, 106 Pac. 1107; In re Coburn, 11 Cal. App. 604, 105 Pac. 924; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892, on rehearing (it is idle and involves a waste of time to undertake to demonstrate to the appellate court in a case in which there exists a substantial conflict in the evidence, that the testimony of the party against whom the findings have been made should be accepted in preference to that of the adverse party); Henderson v. Perrott, 9 Cal. App. 452, 99 Pac. 543; Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500; Nelson v. McCarty, 5 Cal. App. 773, 91 Pac. 406; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344; Craig v. Dowie, 4 Cal. App. 176, 87 Pac. 250; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820; Frutig v. Trafton, 2 Cal. App. 47, 83 Pac. 70; Idol v. San Francisco Constructing Co., 1 Cal. App. 92, 81 Pac. 665; Grunsky v. Field, 1 Cal. App. 623, 82 Pac. 979; Doe v. Allen, 1 Cal. App. 560, 82 Pac. 568.

9. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Rice v. Cunningham, 29 Cal. 492, 495 (per Sanderson, J.).

10. See supra, § 515.

11. Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720; Barry v. Coughlin, 90 Cal. 220, 27 Pac. 197; Lick v. Madden, 36 Cal. 208, 95 Am. Dec. 175; Wilson v. Cross & Co., 33 Cal. 60, 67; Rice v. Cunningham, 29 Cal. 492; Dugan v. Adams & Co., 1 Cal. Unrep. 52.

12. Hill v. Smith, 32 Cal. 167.

13. Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 Pac. 158; Piper v. Hawley, 179 Cal. 10, 175 Pac.

therefore, for an appellant, contending that the verdict or findings are not sustained by the evidence, or are against the weight of evidence, to point out or even demonstrate to the appellate court that the verdict is against the preponderance of the evidence, or that upon the same evidence other persons would have come to a different conclusion.[14] He must show that in the evidence upon which the findings are based, there is no substantial conflict, and that the facts and inferences deducible from them, as found by the court, are contrary to the evidence.[15]

§ 544. Reason of Rule.—Frequently the courts use expressions which seem to point to a want of power to review questions of fact. For example, it is often said: The verdict of a jury or the finding of a trial court on conflicting testimony cannot be reviewed;[16] with the conclusion of the lower court on conflicting evidence the court cannot interfere;[17] the finding of the jury under the con-

417; Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818, 119 Pac. 512; Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; Grant v. McPherson, 104 Cal. 165, 37 Pac. 864; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Gale v. Tuolumne County Water Co., 44 Cal. 43; Wilson v. Fitch, 41 Cal. 363; Van Dusen v. Star Quartz Mining Co., 36 Cal. 571, 95 Am. Dec. 209; Kile v. Tubbs, 32 Cal. 332; Lick v. Madden, 32 Cal. 208, 95 Am. Dec. 175; Showers v. Zanone, 7 Cal. Unrep. 203, 85 Pac. 851; Silveira v. Reese, 7 Cal. Unrep. 112, 71 Pac. 515 (the court will not pass on the weight of the evidence, in case of a conflict); Cruickshank v. Vogh, 32 Cal. App. Dec. 722, 192 Pac. 86; Union Collection Co. v. Rogers, 18 Cal. App. 205, 122 Pac. 970; Ramsbottom v. Fitzgerald, 5 Cal. Unrep. 941, 52 Pac. 149; Nelson v. McCarty, 5 Cal. App. 773, 91 Pac. 406; Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224. See infra, § 550. Where the evidence is substantially conflicting, it is not the province of the appellate court to weigh it or determine whether or not the witnesses testified falsely. Lummer v. Unruh, 25 Cal. App. 97, 142 Pac. 914.

14. Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625.

15. McLain v. Baker, 82 Cal. 529, 22 Pac. 1084; Spring Valley Water Wks. v. San Mateo Water Wks., 64 Cal. 123, 28 Pac. 447.

16. Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276.

17. Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. 1003.

flict is conclusive, and not subject to review;[18] the appellate courts have no power to interfere with the finding on conflict of testimony.[19] These expressions, say the court of appeals in a recent case, are not wholly accurate. It is true that there is nothing in the constitution or statutes prohibiting appellate courts from reviewing questions of fact, and there is no doubt that technically the appellate courts have power to interfere with a finding of fact that is supported by substantial evidence or set it aside when it appears reasonably certain that said finding or verdict is wrong.[20]

The reason for the rule, then, is not the want of authority, but in part rests upon the fact that the appellate court is cut off from the only means through which a decision can be intelligently reached in such cases, namely, the appearance and general bearing of witnesses.[1] This, however, is not the only reason of the rule, for it is well settled that the rule is applicable also where the evidence is documentary and the appellate court has an equal opportunity with the trial court to determine its credibility.[2] A further reason for the rule is founded on the essential distinction between the trial and appellate courts under our system and grows out of considerations of jurisdiction. It is the province of the trial court to find questions of fact, and of the appellate court to review errors

18. Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 Pac. 622.

19. Humboldt Savings & Loan Soc. v. Dowd, 137 Cal. 408, 70 Pac. 274.

20. Dunaway v. Anderson, 22 Cal. App. 691, 136 Pac. 309. But see Baker v. Baker, 9 Cal. App. 736, 100 Pac. 892, and Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677, per Hart, J., in denying a rehearing, in which it is stated that under the constitution reviewing courts are limited to a consideration of questions of law alone.

1. Estate of Moore, 162 Cal. 324, 122 Pac. 844; Estate of Gianelli, 146 Cal. 139, 79 Pac. 841; Howard v. Howard, 134 Cal. 346, 66 Pac. 367; Spitler v. Kaeding, 133 Cal. 500, 65 Pac. 1040; Andrus v. Smith, 133 Cal. 78, 65 Pac. 320; Wilson v. Cross, 33 Cal. 60; Rice v. Cunningham, 129 Cal. 492; Dunaway v. Anderson, 22 Cal. App. 691, 136 Pac. 309.

2. See infra, § 547.

of law. The appellate court has no power to make findings. That power is vested exclusively in the trial court, and every litigant has the right to insist that the verdict of a jury or the finding of the trial court, when based upon sufficient evidence, shall be absolutely controlling without inference by the appellate court.[3]

§ 545. Character of Conflict.—The conflict in the evidence precluding an appellate court from disturbing a verdict or finding, within the rule, must be a real and substantial conflict upon material points, not a mere pretense thereof, or a conflict that does not relate to controlling issues.[4] It must be such a substantial variance in the evidence adduced on both sides of a litigated question of fact as will sustain the determination of the jury or the lower court, no matter which way it may find therefrom.[5] As was said in a recent case: A finding against the great weight and preponderance of evidence can be maintained on the doctrine of "conflict" only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find

3. Estate of Moore, 162 Cal. 324, 122 Pac. 844; Reay v. Butler, 95 Cal. 206, 30 Pac. 208 (per McFarland, J.); Bauder v. Tyrrel, 59 Cal. 99.

4. Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 Pac. 377; Estate of Wilson, 117 Cal. 262, 268, 49 Pac. 172, 711; Field v. Shorb, 99 Cal. 661, 34 Pac. 504 (where the great current of the evidence is against the verdict, one or two general statements or assertions by one or two witnesses do not raise a substantial conflict); Driscoll v. Market St. Cable Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; Rice v. Cunningham, 29 Cal. 492; Carpentier v. Gardiner, 29 Cal. 160.

"The evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. The finding or verdict must have meritorious support in the evidence. A few general statements without substantial reasons is not sufficient to raise a conflict." Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67; In re Coburn, 11 Cal. App. 604, 105 Pac. 924.

5. Raymond v. Glover, 144 Cal. 548, 78 Pac. 3; Satterlee v. Bliss, 36 Cal. 489; Kevane v. Miller, 4 Cal. App. 598, 88 Pac. 643.

the fact the other way.[6] Therefore, to say that a finding cannot be disturbed because the evidence to sustain it as found is substantially conflicting is also to say that, if the finding was the other way, the same substantial conflict would equally preclude its disturbance by the appellate court.[7] The conflict may be raised by facts and circumstances tending to contradict the direct evidence of a witness, though some of the evidence is inadmissible, but was admitted without objection or without sufficient objection.[8] And since under the code the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact except perjury or treason, such evidence is necessarily sufficient to create a substantial conflict in the evidence regardless of the number of witnesses or the inferences supporting their testimony to the contrary.[9]

§ 546. Application of Rule.—This rule as to conflict applies to conflicting expert testimony.[10] And it applies with the same force to conflict between the testimony of witnesses for one party as it does to like conflict between witnesses of the respective parties.[11]

The same rules with reference to balancing conflicting testimony govern the appellate court in probate cases,[12] and in cases formerly denominated cases in equity as in

6. Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 Pac. 377; California Real Estate Co. v. Walk-up, 27 Cal. App. 441, 150 Pac. 385 ("We accept this rule as sound").

7. Raymond v. Glover, 144 Cal. 548, 78 Pac. 3.

8. Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134.

9. Thom v. Stewart, 162 Cal. 413, 122 Pac. 1069; Estate of Gird, 157 Cal. 533, 137 Am. St. Rep. 131, 108 Pac. 499; Grant v. McPherson, 104 Cal. 165, 37 Pac. 864. A preponderance of evidence is not inconsistent with the existence of a substantial conflict in the evidence and the question of conflict is in no way dependent upon the greater number of witnesses on one side and the limited number on the other. Broder v. Conklin, 121 Cal. 282, 53 Pac. 699.

10. Barker v. Gould, 122 Cal. 240, 54 Pac. 845.

11. Brock v. Pearson, 87 Cal. 581, 25 Pac. 963; Crook v. Forsyth, 30 Cal. 662; Frazee v. Fox Film Corp., 31 Cal. App. Dec. 322, 188 Pac. 286.

12. Estate of Gianelli, 146 Cal. 139, 79 Pac. 841 (appeal from order settling executor's final account).

law cases. Under our system, in actions equitable in nature, the witnesses are examined in open court and minutes of the testimony taken as in actions at law. The record is brought up in the same mode as in actions at law. The court below is possessed of all the aids necessary to enable it to give due credit to every item of testimony which is accessible to the judge who tries an action at law, and which, from the nature of things, is inaccessible to the appellate court. For these reasons, if for no other, there would be no propriety in making a distinction between the two classes of cases.[13] The rule applies also to a report of commissioners to assess damages from widening of a street,[14] to a decision of a referee,[15] to an order upon motion for new trial,[16] and to other cases.[17]

§ 547. Where Evidence is Documentary.—It has been contended that the rule of "conflict" does not apply where the evidence is documentary, and that in such case the appellate court should weigh and measure it by the same standard that the trial court is required to apply. But in view of the fact that one of the reasons for the rule is

13. Under the old chancery practice, the testimony was taken by deposition, generally before a master or a commissioner, and reduced to writing. When the testimony had all been filed, the case was argued upon it before the proper court, and on appeal the entire evidence was before the chancellor or appellate court in the same form in which it was presented to the court below. The appellate court had the same means of determining the credibility of witnesses as the court below. But it is not so under our system as pointed out in the text. Doe v. Vallejo, 29 Cal. 385 (per Sawyer, J.).

Even in an equity case, in which a jury has been impaneled, the findings of the court are as conclusive as if no jury had been called, and the appellate court will not, in case of conflict between the findings of the trial court and of the jury, proceed to weigh the evidence and decide whether it preponderates in favor of the findings of the court or of the jury. Stockman v. Riverside Land & Irr. Co., 64 Cal. 57, 28 Pac. 116.

14. Appeal of Piper, 32 Cal. 530.

15. See infra, § 552.

16. See infra, § 554.

17. See infra, § 553.

the essential distinction between the trial and appellate courts as to their functions to decide questions of fact, such a contention is untenable, and it has been so held.[18] Therefore, in consideration of an appeal from an order made upon affidavits, which involves the decision of a question of fact, the appellate court is governed by the same rule which controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts therein stated must be taken as established.[19] It has been suggested, however, the appellate

18. Patterson v. Keeney, 165 Cal. 465, Ann. Cas. 1914D, 232, 132 Pac. 1043; Diller v. Northern California Power Co., 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359 (where motion for new trial was based upon conflicting affidavits); Estate of Moore, 162 Cal. 324, 122 Pac. 844; Cole v. Roebling Construction Co., 156 Cal. 443, 105 Pac. 255; Bradley v. Davis, 156 Cal. 267, 104 Pac. 302 (overruling Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863, and holding a finding of a trial court on a motion for change of venue as to the residence of the defendant is conclusive on the appellate court where the evidence as to residence is conflicting); Kataoka v. Hanselman, 150 Cal. 673, 89 Pac. 1082; Crisman v. Lanterman, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89 (holding that Wilson v. Cross, 33 Cal. 60, and Lander v. Beers, 48 Cal. 546, are not in harmony with later decisions); Wadleigh v. Phelps, 147 Cal. 541, 82 Pac. 200; Knox v. Moses, 104 Cal. 502, 38 Pac. 318 (where the action was tried and submitted upon evidence taken in another case); Daniels v. Church, 96 Cal. 13, 30 Pac. 798; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; In re Fisher, 75 Cal. 523, 17 Pac. 644; Hanchett v. Finch, 47 Cal. 192 (affidavits on application for new trial); Barrett v. Graham, 19 Cal. 632; Love v. Watts, 1 Cal. Unrep. 24; Marston v. Watson, 20 Cal. App. 465, 129 Pac. 611; Carpenter v. Ashley, 15 Cal. App. 461, 115 Pac. 268 (on motion for change of venue).

19. Patterson v. Keeney, 165 Cal. 465, Ann. Cas. 1914D, 232, 132 Pac. 1043; Diller v. Northern Cal. Power Co., 162 Cal. 531, Ann. Cas. 1913D, 908, 123 Pac. 359; Flood v. Goldstein Co., 158 Cal. 247, 110 Pac. 916; Estudillo v. Security Loan & Trust Co., 158 Cal. 66, 109 Pac. 884 (the rule applies even though the question in controversy be the disqualification of the judge himself); Bradley v. Davis, 156 Cal. 267, 104 Pac. 302, overruling Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863 (where the order refusing to change the place of trial was based on conflicting affidavits as to the place of residence of the defendant); Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001; McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8 (order denying a change of venue on conflicting affidavits); Egener v. Juch, 101 Cal. 105, 35

court would no doubt look a little more closely into the evidence when it consists entirely of depositions, or affidavits, or notes of former testimony.[20]

§ 548. Where Evidence on One Side Consists of Presumption.—The rule under discussion is applicable where the evidence of the plaintiff upon an issue consists merely of a disputable presumption, as, for example, where the sole evidence of a consideration for a note sued on, is the presumption arising from its execution. In such case when the court finds in favor of the presumption, the presumption furnishes sufficient evidence for the finding of the court on that issue, and the finding is conclusive on the appellate court.[1] The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all the evidence including the presumption.[2] The jury or the trial court sitting as

Pac. 873 (order dissolving attachment); Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51 (order on motion to set aside default judgment); Sourbis v. Rhodes, 33 Cal. App. Dec. 577, 194 Pac. 521 (order granting a change of venue); Fox v. Flood, 30 Cal. App. Dec. 862, 187 Pac. 68; Williams v. Reed, 30 Cal. App. Dec. 89, 185 Pac. 515; Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829; Kern Valley Bank v. Koehn, 10 Cal. App. 679, 103 Pac. 173. See infra, § 553. And see AFFIDAVITS, vol. 1, p. 681.

20. Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

1. Thom v. Stewart, 162 Cal. 413, 122 Pac. 1069; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; People v. Siemsen, 153 Cal. 387, 95 Pac. 863 ("These presumptions, while disputable, are in themselves evidence . . . and will support a finding made in accordance with them, even though there be evidence to the contrary); Moore v. Gould, 151 Cal. 723, 91 Pac. 616; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497; French Bank v. Beard, 54 Cal. 480; Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677, citing People v. Milner, 122 Cal. 171, 54 Pac. 833.

2. Pacific Portland C. Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041. See, also, Maupin v. Solomon, 41 Cal. App. 323, 183 Pac. 198 (the district court of appeals in this case decided that when a fact is proven contrary to a presumption,

a jury is the proper tribunal to determine whether the "evidence to the contrary" has overcome and dispelled the presumption.[3]

§ 549. Upon Evidence Subject to Different Inferences. Though there is no conflict in the evidence, if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, the conclusion reached by the jury, or the court sitting as such, should be deemed final and not disturbed on appeal for want of sufficient evidence to justify the verdict or findings.[4] In such case the decision of the trial court or the jury is as conclusive as where the conflict arises directly from the evidence.[5] If a finding of fact is based upon a reasonable inference, it is not within the power of an appellate court to set it

no conflict arises but the presumption is simply overcome and dispelled. The supreme court, however, denying a rehearing, held that there was no "presumption" in the case but an "inference" which the jury might draw). As to presumptions, see EVIDENCE.

3. Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677, approved in Thom v. Stewart, 162 Cal. 413, 122 Pac. 1069. See Grantham v. Ordway, 40 Cal. App. 758, 182 Pac. 73, saying whether a presumption has been controverted is a question of fact.

4. MacDermott v. Hayes, 175 Cal. 95, 170 Pac. 616; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Crisman v. Lanterman, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89; Lewis v. Tyler, 23 Cal. 364; Kelly v. Brown, 2 Cal. Unrep. 536, 8 Pac. 38; Lawson v. McGee, 1 Cal. Unrep. 19; Abdullah v. Abdullah, 33 Cal. App. Dec. 591, 194 Pac. 511; Lewis v. Tanner, 33 Cal. App. Dec. 163, 193 Pac. 287; Cronenwett v. Iowa Underwriters, 30 Cal. App. Dec. 713, 186 Pac. 824; Off v. Crump, 40 Cal. App. 173, 180 Pac. 360; Spreckels v. State, 30 Cal. App. 363, 158 Pac. 549; Vaughn v. Bixby, 24 Cal. App. 641, 142 Pac. 100; Haughton Co. v. Kennedy, 8 Cal. App. 777, 97 Pac. 905. See supra, § 540.

5. Mentone Irr. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082. "When the facts necessary to sustain the judgment do not naturally flow as a necessary sequence from the probative facts, but must depend upon inferences to be deduced therefrom, it is as exclusively the province of the trial court to make these deductions and find the facts, as where the evidence itself is conflicting." Cauhape v. Security Savings Bank, 118 Cal. 82, 50 Pac. 310.

aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence. Such a finding is as completely a finding based upon good and sufficient evidence as any other finding of fact, and can be reviewed and set aside as a matter of law only when not sustained by adequate legal evidence.[6] An appellate court cannot review a finding, because in its judgment the inference induced by the trial court is improbable, or more unlikely to be untrue than the opposite one.[7] The court's duty begins and ends, says the court in a recent case, with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached.[8] This rule is applicable also where the parties stipulate to the probative facts, and different inferences may reasonably be drawn from the agreed facts.[9]

§ 550. Against Weight of Evidence.—No rule of appellate practice is more firmly settled than that the weight of evidence is for the jury or the court passing on the facts, and that, as a general rule, an appellate court does not pass upon the weight or preponderance of evidence.[10]

6. Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753.

7. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Cronenwett v. Iowa Underwriters, 30 Cal. App. Dec. 713, 186 Pac. 824; Kimball v. Semple, 25 Cal. 455.

8. Dunphy v. Dunphy, 161 Cal. 380, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818, 119 Pac. 512.

9. Crisman v. Lanterman, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89.

10. F. Chevalier Co. v. Collins, 61 Cal. Dec. 72, 195 Pac. 44; Smith v. Royer, 181 Cal. 165, 183 Pac. 660 (an appellate court does not weigh evidence, but only considers its legal sufficiency as distinguished from its probative force); Estate of Jepson, 178 Cal. 257, 172 Pac. 1107; Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Breitenbucher v. Oppenheim, 160 Cal. 98, 116 Pac. 55; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Ripperdan v. Weldy, 149 Cal. 667, 87 Pac. 276; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000 (quoting Reynolds v. Robinson, 82 N. Y. 106, 37 Am. Rep. 552); Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797, 798 (to the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in the appellate court); Hein-

The appellate court is not concerned with the question of the preponderance of the evidence, or the substantial character of the showing made by the defendant, but only with the single inquiry, Does the record contain any evidence tending to support the finding assailed?[11] Whenever the question is raised on appeal as to the side on which the evidence preponderates, and there is testimony supporting the conclusion of the jury or the findings of a trial court, which testimony is not inherently improbable, the answer must always be that the jury or the trial court has conclusively decided the question. In other words, the preponderance of the evidence in such case must always be held by a reviewing court to be with the victorious party in the court below.[12] The mere fact that the testimony is all one way does not require a reversal of a verdict or finding against such testimony, as the court or jury have the right to pass upon the credibility of witnesses and reject their testimony even though not discredited by direct testimony.[13] While, as a general rule, the uncontradicted testimony of a witness to a particular fact may not be disregarded, this rule has exceptions, and an appellate court cannot control the conclusion of the court

len v. Heilbron, 97 Cal. 101, 31 Pac. 838; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Lassing v. Paige, 56 Cal. 139; Kile v. Tubbs, 32 Cal. 332; Lick v. Madden, 36 Cal. 208, 95 Am. Dec. 175; Kimball v. Semple, 25 Cal. 440, 455; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516; Ogilvie v. Barry, 1 Cal. Unrep. 254; Gregory v. Haynes, 1 Cal. Unrep. 83; Whitney v. Flint, 1 Cal. Unrep. 8; Kohlberg v. Havens, 41 Cal. App. 222, 182 Pac. 467; Pacific Gas & Electric Co. v. Rollins, 32 Cal. App. 782, 164 Pac. 53; Snyder v. Miller, 29 Cal. App. 566, 157 Pac. 22; Garwood v. Scheiber, 246 Fed. 74, 158 C. C. A. 300.

11. Davis v. Angelo, 8 Cal. App. 305, 96 Pac. 909. An objection that plaintiff's case has not been made out by a preponderance of evidence is not reviewable on appeal. Goodwin v. Franich, 37 Cal. App. 493, 174 Pac. 83.

12. Mitchell v. Excelsior Water & Min. Co., 41 Cal. App. 240, 182 Pac. 326.

13. Brock v. Pearson, 87 Cal. 581, 25 Pac. 963; Crook v. Forsyth, 30 Cal. 662; Blankman v. Vallejo, 15 Cal. 638. See infra, this section, for converse of this proposition, where the verdict is supported only by testimony inherently improbable.

or jury in denying the testimony credence, unless it appears that there are no matters or circumstances at all impairing its accuracy.[14]

Yet, as in the case above, where one side of an issue is clearly, amply and firmly established by an unbroken line of evidence, and the jury find the other way upon no evidence that is really and substantially conflicting, or upon a mere pretense of such evidence, or upon evidence so slight as to leave no room to doubt that the verdict was the result of passion or prejudice, the finding should not be allowed to stand.[15] Where there is really no substantial evidence to support a verdict, or the jury were evidently actuated by motives which they had no right to consider, the verdict is unwarranted as a matter of law, even though there may be some slight pretense of evidence to support it.[16] This is the case when the only testimony supporting the verdict or finding is so obviously false or so inherently improbable as to require its rejection.[17] The record, however, must show a great pre-

14. Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Blanc v. Connor, 167 Cal. 719, 141 Pac. 217; Davis v. Judson, 159 Cal. 121, 113 Pac. 147. See EVIDENCE.

15. Estate of Wilson, 117 Cal. 262, 49 Pac. 172. Where a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to another without legal cause, the trial judge should, without hesitation, set the verdict aside, and in the event of his not doing so, the appellate court will grant a new trial. Driscoll v. Market St. Cable Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591.

16. Estate of Morey, 147 Cal. 495, 82 Pac. 57; Estate of Tibbetts, 137 Cal. 123, 69 Pac. 978. A finding of a jury or of a court sitting as a jury upon the weight of the evidence will not be disturbed, unless the finding is impeached for fraud, misconduct or other improper influence. Payne v. Jacobs, 1 Cal. 39.

17. Estate of Jepson, 178 Cal. 257, 172 Pac. 1107; Raker v. Bucher, 100 Cal. 214, 34 Pac. 654, 849; Lind v. Closs, 88 Cal. 6, 25 Pac. 972; Branson v. Caruthers, 49 Cal. 374; Austin v. Newton, 31 Cal. App. Dec. 734, 189 Pac. 471. But see Richey v. Haley, 138 Cal. 441, 71 Pac. 499, holding that where the trial court has found a fact, the appellate court cannot pass upon the credibility of the evidence, nor its inherent improbability, but must determine whether or not there is substantial evidence sufficient to support the finding. See infra, § 551.

ponderance of evidence against the findings to justify a reversal.[18]

§ 551. Limitation on Rule.—While a verdict or finding may be set aside upon appeal where the evidence in support of it is inherently improbable,[19] to warrant an appellate court in determining that there is no substantial evidence because of such improbability, there must exist either a physical impossibility of the evidence being true, or a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story. The appellate court will not indulge in lengthy and dubious computations, nor seek far for a reason to determine that witnesses have committed perjury. It is the duty of the court to harmonize apparent inconsistencies in the statements, if possible, and to do this it will indulge in every reasonable presumption of fact.[20] The appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over testimony of apparently credible witnesses, and the mere improbability of the story of the witness does not justify setting aside the verdict or finding.[1]

§ 552. Findings of Referee or Commissioner.—The code provides that the finding of a referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of such finding with the clerk of

18. Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016. Naglee v. Lyman, 14 Cal. 450 (on rehearing); A. Martin & Co. v. Levy, 1 Cal. Unrep. 514 (a strong case must be made against a verdict or finding on a question of fact, before the appellate court will disturb it). See Field v. Shorb, 99 Cal. 661, 34 Pac. 504 (holding a verdict against the great current of the evidence will be set aside).

19. See supra, § 550.

20. Powell v. Powell, 40 Cal. App. 155, 180 Pac. 346. See Lind v. Closs, 88 Cal. 6, 25 Pac. 972 (holding testimony in action for rape improbable). See supra, § 515.

1. Austin v. Newton, 31 Cal. App. Dec. 734, 189 Pac. 471.

the court judgment may be entered thereon in the same manner as if the action had been tried by the court.[2] The uniform practice is to enter judgment on the report the same as on the verdict of a jury. The decision of a referee upon a question of fact will then be regarded on appeal as conclusive as the verdict of a jury, and will not be disturbed if there is a substantial conflict in the evidence upon which it is based.[3] A finding of a referee will not be disturbed for insufficiency of the evidence, where it is conflicting, confused and uncertain, if there is any evidence to support it.[4]

Orders.

§ 553. In General.—It is well established that an appellate court reviewing orders of trial courts will not disturb the implied findings of fact made by the court in support of its order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as the court has passed upon the weight of evidence or the credibility of witnesses, its implied findings are conclusive,[5] even when based upon conflicting affidavits[6] and when the conflict is not sharp, but only such as to create an uncertainty in the mind of the judge.[7] This rule has been applied to the following orders: An order upon a motion for change of venue;[8] an order upon a motion to

2. Code Civ. Proc., § 644.

3. Estate of McPhee, 156 Cal. 335, Ann. Cas. 1913E, 899, 104 Pac. 455; Noonan v. Hood, 49 Cal. 293; Muller v. Boggs, 25 Cal. 175; Brady v. Brown, 20 Cal. 520; Knowles v. Joost, 13 Cal. 620; Ritchie & Co. v. Bradshaw & Co., 5 Cal. 229 (on appeal from order denying a motion for new trial); Gunter v. Sanchez, 1 Cal. 45; Lomax v. Cooper, 1 Cal. Unrep. 147; Fierro v. Graves, 1 Cal. Unrep. 18.

4. Jackson v. Puget Sound L. Co., 123 Cal. 97, 55 Pac. 788.

5. Kern Valley Bank v. Koehn, 10 Cal. App. 679, 103 Pac. 173.

6. See supra, § 547.

7. Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643.

8. Estudillo v. Security L. & T. Co., 158 Cal. 66, 109 Pac. 884; Brad-

quash the summons;[9] an order upon a motion to dissolve an attachment;[10] an order on a motion to set aside default judgment;[11] an order upon a motion to tax costs;[12] an order upon a motion to vacate a writ of restitution;[13] and an order upon a motion for new trial.[14]

§ 554. Orders on Motion for New Trial.—It is a cardinal doctrine of appellate courts that where upon a question of fact the testimony in the trial court involves a substantial conflict, the action of the court in granting or denying a new trial upon the ground that the verdict or findings are not supported by the evidence will not be disturbed. The granting or refusing of a new trial in such case rests so fully in the discretion of the trial court that its action is conclusive upon the appellate court, unless its discretion appears to have been abused.[15] The

ley v. Davis, 156 Cal. 267, 104 Pac. 302; Bowers v. Modoc etc. Co., 117 Cal. 50, 48 Pac. 979; McKenzie v. Barling, 10 Cal. 459, 36 Pac. 8; Conlon v. Gardner, 3 Cal. Unrep. 838, 32 Pac. 565; Daniels v. Church, 96 Cal. 13, 30 Pac. 798; Hastings v. Keller, 69 Cal. 606, 11 Pac. 218; Creditors v. Welch, 55 Cal. 469; Sourbis v. Rhodes, 33 Cal. App. Dec. 577, 194 Pac. 521; Carpenter v. Ashley, 15 Cal. App. 461, 115 Pac. 268; Henderson v. Cohen, 10 Cal. App. 580, 102 Pac. 826.

9. Dickinson v. Zubiate Mining Co., 11 Cal. App. 656, 106 Pac. 123.

10. Kern Valley Bank v. Koehn, 157 Cal. 237, 107 Pac. 111; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Egener v. Juch, 101 Cal. 105, 35 Pac. 432, 873; Barbieri v. Ramelli, 84 Cal. 174, 24 Pac. 113; Slosson v. Glosser, 5 Cal. Unrep. 460, 46 Pac. 276; Kern Valley Bank v. Koehn, 10 Cal. App. 679, 103 Pac. 173. See ATTACHMENT.

11. Cole v. Roebling Const. Co., 156 Cal. 443, 105 Pac. 255; Savings Bank v. Schell, 142 Cal. 505, 76 Pac. 250; Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51; Bank of Ukiah v. Reed, 6 Cal. Unrep. 604, 63 Pac. 68.

12. Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943.

13. Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643.

14. Hodgdon v. Southern Pacific Co., 75 Cal. 650, 21 Pac. 372 (an order refusing to allow an amendment to a notice of intention); Hanchett v. Finch, 47 Cal. 192. See infra, § 554. The rule has been applied also to an order upon a motion to amend the record. In re Fisher, 75 Cal. 523, 17 Pac. 640.

15. Rahmel v. Rost, 178 Cal. 15, 171 Pac. 1068; Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 165 Pac. 12; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483 (the court may not disturb such order where there was a conflict of evidence upon material issues unless it can say that a verdict in favor of the

same reasons and rules that forbid the disturbing of a verdict or finding when the evidence is conflicting equally preclude the reversing of an order of the court either granting or refusing a new trial asked for on the ground that the verdict or finding is contrary to the evidence. These considerations do not, however, prevail with the

moving party would not have found sufficient legal support in such evidence); Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Empire Investment Co. v. Mort, 169 Cal. 732, 147 Pac. 960; Frost v. Los Angeles Ry. Co., 165 Cal. 365, 132 Pac. 442; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; Mentone Irr. Co. v. Redlands Electric Light & Power Co., 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082 (where different inferences were reasonably deducible from the evidence); Reeve v. Colusa Gas & Electric Co., 152 Cal. 99, 92 Pac. 89; Weisser v. Southern Pac. Ry. Co., 148 Cal. 426, 7 Ann. Cas. 636, 83 Pac. 439; Miller & Lux v. Enterprise Canal & Land Co., 145 Cal. 652, 79 Pac. 439; Swett v. Gray, 141 Cal. 63, 74 Pac. 439; Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449; Holtum v. Germania L. Ins. Co., 139 Cal. 645, 73 Pac. 591; Sullivan v. Market St. Ry. Co., 136 Cal. 479, 69 Pac. 143; Newman v. Overland Pacific Ry. Co., 132 Cal. 73, 64 Pac. 110; Anglo-Nevada Assur. Corp. v. Ross, 123 Cal. 520, 56 Pac. 335; Tibbetts Bros. & Cross v. Bower, 121 Cal. 7, 53 Pac. 359; Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024 (it is immaterial whether the evidence is insufficient to sustain all or a part of the issues upon which the judgment must depend); In re Smith, 98 Cal. 636, 33 Pac. 744; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481; Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; Curtiss v. Starr & Co., 85 Cal. 376, 24 Pac. 806 (rule is not confined to cases tried without a jury); Wiedekind v. Tuolumne County Water Co., 83 Cal. 198, 23 Pac. 311; White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846 (the court's action in granting a new trial will be disturbed only in extreme cases or in cases where the court proceeded upon an erroneous hypothesis); Mahan v. Wood, 79 Cal. 258, 21 Pac. 757; Harnett v. Central Pacific R. R. Co., 78 Cal. 31, 20 Pac. 154; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Minturn v. Bliss, 77 Cal. 90, 19 Pac. 185; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Tide Land Reclamation Co. v. Cunningham, 71 Cal. 221, 16 Pac. 711; Hook v. Hall, 68 Cal. 22, 8 Pac. 596; Doolittle v. Woodcock, 65 Cal. 258, 3 Pac. 873; Thiele v. Koster, 63 Cal. 341 (order denying new trial); Estate of McCarty, 58 Cal. 335; Irving v. Cunningham, 58 Cal. 306; Bronner v. Wetzlar, 55 Cal. 419; Pierce v. Schaden, 55 Cal. 406; Altschul v. Doyle, 48 Cal. 535; Higuerra v. Bernal, 46 Cal. 580; Sherman v. Mitchell, 46 Cal. 576; Green v. Lake Superior & Pacific

trial court. Although there may be a substantial conflict in the evidence, the court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner and credibility of the witnesses, may, if it is dissatisfied with the verdict, and is of the opinion

Fuse Co., 46 Cal. 408; Dickey v. Davis, 39 Cal. 565; Wilson v. Cross & Co., 33 Cal. 60, 67; Hawkins v. Reichert, 28 Cal. 534 (per Rhodes, J.); McGarrity v. Byington, 12 Cal. 426; Weddle v. Stark, 10 Cal. 302 (the motion was granted by the court, but if it had been denied, "our decision would have been the same"); Taylor v. McKinley, 4 Cal. 104; Harloe v. Berwick, 7 Cal. Unrep. 58, 70 Pac. 1060; Taggart v. Bosch, 5 Cal. Unrep. 690, 48 Pac. 1092; Scrivani v. Dondero, 5 Cal. Unrep. 371, 44 Pac. 1066; Steinhart v. Coleman, 5 Cal. Unrep. 162, 41 Pac. 1098; Crowley v. Strouse, 4 Cal. Unrep. 29, 33 Pac. 456; Austin v. Gagan, 3 Cal. Unrep. 533, 30 Pac. 790; Kellogg v. Colgan, 3 Cal. Unrep. 250, 23 Pac. 526; Hogan v. Sanders, 2 Cal. Unrep. 787, 14 Pac. 677; Goodwin v. Burney, 2 Cal. Unrep. 786, 14 Pac. 676; Carlson v. Mutual Relief Assn., 2 Cal. Unrep. 452, 6 Pac. 395; Herzog v. Julien, 2 Cal. Unrep. 356, 4 Pac. 501; Reynolds v. Scott, 2 Cal. Unrep. 334, 4 Pac. 346; Nelson v. Floyd, 2 Cal. Unrep. 325, 4 Pac. 105; Gutierrez v. Brinkerhoff, 2 Cal. Unrep. 232, 1 Pac. 482; Ellis v. Judson, 2 Cal. Unrep. 169; Hodges v. Cushing, 1 Cal. Unrep. 450; Love v. Watts, 1 Cal. Unrep. 24; Marr v. Whistler, 33 Cal. App. Dec. 229, 193 Pac. 600; Mayer v. Goldman, 35 Cal. App. 111, 169 Pac. 412; Pacific Gas & Electric Co. v. Rollins, 32 Cal. App. 782, 164 Pac. 53; Sawyer v. McRoskey, 32 Cal. App. 489, 163 Pac. 336; Miller v. Logan, 32 Cal. App. 28, 161 Pac. 1022 (an order granting a new trial will not be disturbed unless the court can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence); Brode v. Clarke, 31 Cal. App. 182, 159 Pac. 1048; Taylor v. Northern Electric Ry. Co., 26 Cal. App. 765, 148 Pac. 543 (where a new trial because of the inadequacy of damages was granted); Waltz v. Silveria, 25 Cal. App. 717, 145 Pac. 169; Colusa & Hamilton R. R. Co. v. Glenn, 25 Cal. App. 634, 144 Pac. 993 (the same rule applies to condemnation proceedings as to other civil actions); People v. Petros, 25 Cal. App. 236, 143 Pac. 246 (a criminal case); Otten v. Spreckels, 24 Cal. App. 251, 141 Pac. 224; Shilling v. Dodge, 22 Cal. App. 517, 135 Pac. 299; McCarthy v. Morris, 17 Cal. App. 723, 121 Pac. 696 (this is so whether the evidence is insufficient to sustain all or only a portion of the issues upon which the verdict rested); Reeves v. Kinney, 16 Cal. App. 157, 116 Pac. 309; Eidinger v. Sigwart, 13 Cal. App. 667, 110 Pac. 521; Martin v. Markarian & Co., 1 Cal. App. 687, 82 Pac. 1072; Houghton v. Market St. Ry. Co., 1 Cal. App. 576, 82 Pac. 972 (this court will not disturb the action in granting a new trial, unless the evidence is free from substantial conflict and the record shows that the trial court abused its discretion in making the order).

that it is clearly against the weight of the evidence, set it aside and grant a new trial. The judge of the superior court is in a position to judge between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend. Like considerations apply to cases tried by the court without the intervention of a jury. In the hurry of a trial, or in the disposition of cases, deductions of fact and conclusions of law may be indulged which, on maturer reflection, do not commend themselves to its judgment. A wide discretion is accorded to trial courts in the disposition of motions for new trials, where questions as to the sufficiency of evidence are involved, and its action thereon, either in granting or denying the motion, will not, ordinarily, be disturbed.[16] If a new trial is refused, the evidence in favor of the prevailing party must be taken as true, as well as all reasonable inferences deducible therefrom, and if two or more inferences may reasonably arise, that most favorable to the prevailing party must be taken.[17] The denial of a new trial gives added weight to the verdict of the jury if that is possible, the presumption in that case being that the opinion of the judge and jury harmonize in support of the verdict.[18]

Since the rule is based upon the essential distinction between trial and appellate courts, the power of the appellate court in this respect is not enlarged by reason of the fact that the judge who passed upon the motion for new trial did not preside at the trial and for that reason declined to review the evidence.[19]

16. Condee v. Gyger, 126 Cal. 546, 59 Pac. 26; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Ramsay v. McCreery Estate Co., 40 Cal. App. 190, 180 Pac. 544; Hawkins v. Reichert, 28 Cal. 534; Morgan v. Los Angeles Pacific Co., 13 Cal. App. 12, 108 Pac. 735. See NEW TRIAL.

17. Reeve v. Colusa Gas & Electric Co., 152 Cal. 99, 92 Pac. 89.

18. Antoine Co. v. Ridge Co., 23 Cal. 219.

19. Empire Investment Co. v. Mort, 169 Cal. 732, 147 Pac. 960; Reay v. Butler, 95 Cal. 206, 30 Pac. 208; Macy v. Davila, 48 Cal. 646;

VI. SUCCESSIVE APPEALS AND LAW OF THE CASE.

§ 555. In General.—As has already been seen, when an appeal has been determined and the cause has been remanded to the trial court either for entry of a particular judgment or for trial, an appeal may be taken from the judgment entered pursuant to the direction of the appellate court, or from judgments and orders rendered on such further proceedings as may be had.[20] On such subsequent appeal, the scope of the review may be limited by the doctrine of the law of the case. The term "law of the case" is a phrase which has been formulated to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action upon a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness.[1] Where upon an appeal the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and this although in its subsequent consideration the court may be clearly of the opinion that the former decision is erroneous in that particular.[2] While a previous ruling by an appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled according to

Altschul v. Doyle, 48 Cal. 535; Rice v. Cunningham, 29 Cal. 492; Austin v. Gagan, 3 Cal. Unrep. 533, 30 Pac. 790; Gutierrez v. Brinkerhoff, 2 Cal. Unrep. 232, 1 Pac. 482; Miller v. Logan, 32 Cal. App. 28, 161 Pac. 1022; Whitaker v. California Door Co., 7 Cal. App. 757, 95 Pac. 910.

20. See supra, §§ 15–25.

1. Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876 (per Harrison, J.).

2. Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

its intrinsic merits, in the case in which it is made it is more than authority; it is a final adjudication from the consequences of which the court cannot depart, nor the parties relieve themselves.[3]

So when a case once decided and remanded for further proceedings is again brought before the court upon substantially the same facts, the court is precluded, by this doctrine of the law of the case, from reconsidering the questions of law presented and determined on the former appeal,[4] even though it may be of the opinion that the former decision is erroneous;[5] it can only discuss such assignments of error as present questions arising on the last trial,[6] or new questions not decided on the former appeal.[7] The decision is binding upon the court which rendered it, although the personnel of the court may have changed since the first appeal. Litigants are not allowed to speculate on chances from changes in the membership of the courts.[8] Indeed, if this were not the law, the interposition of a new judge might change the law which has been settled by the majority for years.[9] Not only is the decision binding on the appellate court which rendered it, but it is also binding upon another appellate court to which the case may be subsequently appealed.[10] This rule as to the

3. Nieto's Heirs v. Carpenter, 21 Cal. 455; Leese v. Clark, 20 Cal. 387; Phelan v. San Francisco, 20 Cal. 39. See Mulford v. Estudillo, 32 Cal. 131 (holding that a party cannot accept a portion of the decision as the law of the case and reject the remainder. He must accept it with all the qualifications therein stated). As to the rule of stare decisis, see COURTS.

4. Brady v. Kelly, 54 Cal. 590 (when the questions presented on an appeal were finally determined on a former appeal, judgment will be affirmed); Leese v. Clark, 20 Cal. 387.

5. See infra, § 561.

6. Mutual Reserve Fund Life Assn. v. Beatty, 93 Fed. 747, 35 C. C. A. 573.

7. See infra, § 566.

8. Roberts v. Cooper, 20 How. (U. S.) 467, 15 L. Ed. 969, see, also, Rose's U. S. Notes.

9. Clary v. Hoagland, 6 Cal. 685.

10. Fleming v. Law, 28 Cal. App. 110, 151 Pac. 385; MacLeod v. Moran, 11 Cal. App. 622, 105 Pac. 932 (where the first appeal was decided by the supreme court and the second was taken to the district court of appeal); Lowe v. Ozmun, 3 Cal. App. 387, 86 Pac. 729. See infra, § 560.

law of the case on a second appeal has been established by an unbroken line of decisions commencing with Dewey v. Gray, and has been again and again announced and applied.[11]

11. Otten v. Spreckels, 60 Cal. Dec. 6, 191 Pac. 11 (the decision of the district court of appeal constitutes the law of the case to the same extent as if it had been made by the supreme court); Estate of Carothers, 168 Cal. 691, 144 Pac. 957; McBoyle v. Union Nat. Bank, 168 Cal. 263, 142 Pac. 837; Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62; Neale v. Morrow, 163 Cal. 445, 125 Pac. 1053; Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251; Smith v. Goethe, 159 Cal. 628, Ann. Cas. 1912C, 1205, 115 Pac. 223; Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Estate of Wickersham, 153 Cal. 603, 96 Pac. 311; Flood v. Templeton, 152 Cal. 148, 13 L. R. A. (N. S.) 579, 92 Pac. 78; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182; Reeve v. Colusa Gas & Electric Co., 151 Cal. 29, 91 Pac. 802; Emerson v. Yosemite Gold Min. & Milling Co., 149 Cal. 50, 85 Pac. 122; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235; Benson v. Bunting, 141 Cal. 462, 75 Pac. 59; Snyder v. Jack, 140 Cal. 584, 74 Pac. 139, 355; Cranes Gulch Min. Co. v. Scherrer, 137 Cal. 606, 70 Pac. 1128; McGraw v. Friend & Terry Lumber Co., 133 Cal. 589, 65 Pac. 1051; Faulkner v. Hendy, 123 Cal. 467, 56 Pac. 99; Balfour v. Fresno Canal & Irr. Co., 123 Cal. 395, 55 Pac. 1062; Brind v. Gregory, 122 Cal. 480, 55 Pac. 250; Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731; Horton v. Jack, 115 Cal. 29, 46 Pac. 920; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000 (per Harrison, J.); Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Auburn Opera House & P. Assn. v. Hill, 113 Cal. 382, 45 Pac. 695; Porter v. Muller, 112 Cal. 355, 44 Pac. 729; Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Krumdick v. White, 107 Cal. 37, 39 Pac. 1066; Mills v. Home Benefit Life Assn., 105 Cal. 232, 38 Pac. 723; Mahan v. Wood, 105 Cal. 12, 38 Pac. 507; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; People v. Hamilton, 103 Cal. 488, 37 Pac. 627 (a criminal case); Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; People v. Holladay, 102 Cal. 661, 36 Pac. 927; Baker v. Brickell, 102 Cal. 620, 36 Pac. 950; Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675; Estate of Couts, 100 Cal. 400, 34 Pac. 865; Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876; People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; Reed v. Ring, 93 Cal. 96, 28 Pac. 851; Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174, 27 Pac. 657; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Moulton v. Knapp, 88 Cal. 446, 26 Pac. 210; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Priet v. De la Montanya, 85 Cal. 148, 24 Pac. 612; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Christy v. Spring Valley Water Works, 84 Cal. 541, 24 Pac. 307; In re Cook's Estate, 83 Cal. 415, 23 Pac. 392;

The doctrine of the law of the case has been recognized always as a harsh doctrine. It tends to prevent a judicial consideration of cases, and it does not therefore meet

Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (opinion in department); Thompson v. White, 76 Cal. 381, 18 Pac. 399; City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; Daniel v. Smith, 75 Cal. 548, 17 Pac. 683; Johnston v. San Francisco Savings Union, 75 Cal. 134, 16 Pac. 753; McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Fisk v. Atkinson, 71 Cal. 452, 10 Pac. 374, 12 Pac. 498; Hoadley v. San Francisco, 70 Cal. 320, 12 Pac. 125; Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676; Taylor v. McLain, 64 Cal. 513, 2 Pac. 399 (a decision that an action is barred by the statute of limitations); Sharpstein v. Friedlander, 63 Cal. 78; Dilla v. Bohall, 62 Cal. 610; Wittenbrock v. Bellmer, 62 Cal. 558; Morenhaut v. Bell, 62 Cal. 336; King v. La Grange, 61 Cal. 221; Wilkinson v. Merrill, 56 Cal. 559; Brady v. Kelly, 54 Cal. 590; Thompson v. Felton, 54 Cal. 547; Donner v. Palmer, 51 Cal. 629; Carpentier v. Brenham, 50 Cal. 549; Martin v. Parsons, 50 Cal. 498; Jaffe v. Skae, 48 Cal. 540; Cox v. Western Pacific R. R. Co., 47 Cal. 87; Gates v. Salmon, 46 Cal. 361; Stone v. Bumpus, 46 Cal. 218; Lick v. Diaz, 44 Cal. 479; Hobbs v. Duff, 43 Cal. 485; Poorman v. D. O. Mills & Co., 43 Cal. 323; McKinlay v. Tuttle, 42 Cal. 570; Yates v. Smith, 40 Cal. 662; Polack v. McGrath, 38 Cal. 666; Page v. Fowler, 37 Cal. 100; Kile v. Tubbs, 32 Cal. 332; Malford v. Estudillo, 32 Cal. 131; Lucas v. San Francisco, 28 Cal. 591; Nieto's Heirs v. Carpenter, 21 Cal. 455; Soule v. Ritter, 20 Cal. 522; Haynes v. Meeks, 20 Cal. 288; Phelan v. San Francisco, 20 Cal. 39; Crowell v. Gilmore, 17 Cal. 194; Soule v. Dawes, 14 Cal. 247; Ritter v. Stevenson, 11 Cal. 27; Gunter v. Laffan, 7 Cal. 588; Clary v. Hoagland, 6 Cal. 685; Dewey v. Gray, 2 Cal. 374; Woodside v. Tynan, 5 Cal. Unrep. 807, 50 Pac. 424; Smith v. City of San Luis Obispo, 4 Cal. Unrep. 344, 34 Pac. 830; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516; Richardson v. Dunne, 3 Cal. Unrep. 728, 31 Pac. 737; Carr v. Quigley, 2 Cal. Unrep. 823, 16 Pac. 9; Lang v. Specht, 2 Cal. Unrep. 111; Whitney v. West Coast Life Ins. Co., 33 Cal. App. Dec. 124, 193 Pac. 149; Lally v. Kuster, 32 Cal. App. Dec. 697, 192 Pac. 78 (a determination that the defendant was guilty of negligence as a matter of law is binding on a subsequent appeal, the evidence being the same); McPhail v. Nunes, 32 Cal. App. Dec. 699, 192 Pac. 95 (a decision that the service of summons is insufficient is binding as law of the case); Hubbard v. Jurian, 32 Cal. App. Dec. 256, 190 Pac. 1052 (the decision is law of the case although since departed from); Fairmont Creamery Co. v. Los Angeles Ice & C. S. Co., 31 Cal. App. Dec. 1043, 190 Pac. 194; Robben v. Benson, 29 Cal. App. Dec. 791, 185 Pac. 200 (a decision that two names are not idem sonans is binding on a subsequent appeal); Morrell v. San Tomas Drying & Packing Co., 30 Cal. App. 194, 157 Pac. 818 (a de-

with the favor of the courts, and will not be extended beyond the exigencies which demand its application,[12-13] or beyond the cases in which it has hitherto been held to apply.[14] Where, as was formerly the rule in California, a party is authorized to appeal from a judgment and an order denying a new trial, the disposition of one of the appeals does not affect the rights of the party under the other. The doctrine of the law of the case could not prevent the appellate court from fully investigating and deciding the second appeal to the extent of modifying or wholly changing its former decision if it was satisfied that an error had been committed. The case was regarded as within the control of the appellate court until both appeals were determined.[15]

cision that a suit was not prematurely brought is conclusive upon a second appeal); Hartfield v. Aldereto, 26 Cal. App. 604, 147 Pac. 991 (an order denying a motion to dismiss an appeal which has become final is law of the case on the points involved in the motion); Weller v. Brown, 25 Cal. App. 216, 143 Pac. 251; Conde v. Sweeney, 16 Cal. App. 157, 116 Pac. 319; Keifer v. Myers, 14 Cal. App. 338, 111 Pac. 1038; Dollar v. International Banking Corp., 13 Cal. App. 331, 109 Pac. 499 (a decision that an instrument is non-negotiable is law of the case); Koyer v. Willmon, 12 Cal. App. 87, 106 Pac. 599 (decisions of questions of law arising out of documentary evidence which establishes undisputed facts are the law of the case); MacLeod v. Moran, 11 Cal. App. 622, 105 Pac. 932 (decision as to effect of the abandonment of a homestead); Bradley v. Bush, 11 Cal. App. 287, 104 Pac. 845; Elliott v. Bunce, 10 Cal. App. 741, 103 Pac. 897; Bell v. Thompson, 8 Cal. App. 483, 97 Pac. 158 (after an affirmance of a judgment for costs, the appellant is estopped from litigating any question involved in the appeal, and it must be presumed that all questions respecting the amount thereof or the regularity of the proceedings upon which the judgment for costs was based were litigated); Davis v. Pacific Improvement Co., 7 Cal. App. 452, 94 Pac. 595; Lowe v. Ozmun, 3 Cal. App. 387, 86 Pac. 729; Mutual Reserve Fund Life Assn. v. Beatty, 93 Fed. 747, 35 C. C. A. 573. See infra, §§ 620–624, as to decision of court of review as law of the case upon trial. See infra, § 564, decision on motion to dismiss as law of case on renewal of motion.

12-13. Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200 (per Garoutte, J., concurring); Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876.

14. Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200 (per Van Fleet, J.); Wixson v. Devine, 80 Cal. 385, 22 Pac. 224.

15. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

§ 556. Reason of Rule.—Different reasons have been given by the courts for the doctrine of the law of the case. The reason for the rule is said in some of the cases to rest upon the doctrine of res judicata;[16] in others, upon the want of the power of the appellate court, when the case has gone from its jurisdiction, to annul or reverse its judgment or decree for any error of law or fact,[17] or upon the necessity for the rule as a matter of public policy.[18] The supreme court has no appellate jurisdiction over its own judgments; it cannot review or affirm them after the case has once passed, by the issuance of the remittitur, from its control.[19] It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration; whether right or wrong, it has become the law of the case. So, on the other hand, if upon the construction of the contract supposed, the judgment of the court below is reversed and a new trial ordered, the decision is equally conclusive as to the principles which shall govern on the retrial; it is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of the judgment. The court cannot recall the case and reverse its decision after the remittitur is issued. It has determined the principles of law which shall govern, and having thus deter-

16. Lucas v. San Francisco, 28 Cal. 591; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Soule v. Dawes, 14 Cal. 247; Knight v. Hall, 28 Cal. App. 435, 152 Pac. 952; McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191; People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556 ("Considered by the rule of res judicata, the authorities are conclusive, and no clear distinction can be drawn between the rule of res adjudicata and the rule of finality of decision declared in the latter case").

17. Davidson v. Dallas, 15 Cal. 75; People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556.

18. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556.

19. Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876; Leese v. Clark, 20 Cal. 387.

mined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below.[20] Again, if it were not for this salutary rule, litigation might go on indefinitely to the great detriment, not only of the parties concerned, but of the public.[1]

§ 557. Necessity for Identity of Facts.—One of the principles upon which the doctrine of the law of the case rests is that of estoppel by judgment. In view of this principle, it follows that it is only the matters which are actually adjudged or determined as the basis of the judgment of the appellate court that can be considered as the law of the case, and that when the judgment or determination is made upon a certain state of facts, it ceases to be of binding force if the facts presented upon a subsequent appeal are essentially different. In that event, the questions raised on the subsequent appeal will be open, and the court can and will decide the case on its merits unembarrassed by any views expressed on the former opinion.[2] As was stated in an early case, when a decision

20. Leese v. Clark, 20 Cal. 387; Davidson v. Dallas, 15 Cal. 75.

1. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131 (per Works, J.); Page v. Fowler, 37 Cal. 100; Soule v. Dawes, 14 Cal. 247.

2. Otten v. Spreckels, 60 Cal. Dec. 6, 191 Pac. 11; Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920; Duckworth v. Watsonville Water & Light Co., 170 Cal. 425, 150 Pac. 58; Smith v. Goethe, 159 Cal. 628, Ann. Cas. 1912C, 1205, 115 Pac. 223; Millsap v. Balfour, 158 Cal. 711, 112 Pac. 450; Alcorn v. Gieseke, 158 Cal. 396, 111 Pac. 98; Flood v. Templeton, 152 Cal. 148, 13 L. R. A. (N. S.) 579, 92 Pac. 78; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; McGraw v. Friend & Terry Lumber Co., 133 Cal. 589, 65 Pac. 1051; Bennett v. Wilson, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 880; Stockton Combined H. & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Greenberg v. California Bituminous Rock Co., 107 Cal. 667, 40 Pac. 1053; Krumdick v. White, 107 Cal. 37, 39 Pac. 1066; Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500; Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558 (holding that since the court on an appeal from an order denying a motion for a new

relates to a matter of fact, the doctrine of the law of the case can be invoked only when the fact appears again to the appellate court under the same circumstance in respect to which it was originally considered.[3] On the second trial there may be material changes in the pleadings,[4] or in the evidence,[5] or in the findings.[6] In either case, the decision on the former appeal would not be binding on the second appeal as the law of the case. When new issues are made involving the finding of facts which could not be found under the pleadings which went to the supreme court, as to such new fact, the opinion on the former appeal stands upon the same footing as if it were given in another case.[7] So, also, where an appeal is based on inferences from the absence of findings, the decision is not binding on a subsequent appeal where the

trial is limited to a review of the action of the court upon the grounds upon which the new trial was asked, it is not required to determine what is the law of the case on a former appeal from a judgment rendered on sustaining a demurrer to a complaint, or from an order granting a new trial after a judgment of nonsuit, as this question has no relevancy in determining whether the court erred in committing error in admitting or excluding evidence, or made its findings without sufficient evidence to support them); Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Cross v. Zellerbach, 63 Cal. 623; Meeks v. Southern Pacific R. R. Co., 56 Cal. 513, 38 Am. Rep. 67; Mitchell v. Davis, 23 Cal. 381; Nieto's Heirs v. Carpenter, 21 Cal. 455; Leese v. Clark, 20 Cal. 387; Davidson v. Dallas, 15 Cal. 75; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516 (per Harrison, J.); Robben v. Benson, 29 Cal. App. Dec. 791, 185 Pac. 200; Elizalde v. Murphy, 11 Cal. App. 32, 103 Pac. 904; Prefumo v. Russell, 10 Cal. App. 113, 101 Pac. 24; Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713. See People v. Hamilton, 103 Cal. 488, 37 Pac. 627 (a criminal case).

3. Nieto's Heirs v. Carpenter, 21 Cal. 455; quoted in McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879.

4. Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920; Alcorn v. Gieseke, 158 Cal. 396, 111 Pac. 98; Flood v. Templeton, 152 Cal. 148, 13 L. R. A. (N. S.) 579, 92 Pac. 78.

5. Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920; Leese v. Clark, 20 Cal. 387; Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713.

6. Smith v. Goethe, 159 Cal. 628, Ann. Cas. 1912C, 1205, 115 Pac. 223; Hibernia Savings & Loan Society v. Farnham, 153 Cal. 578, 126 Am. St. Rep. 129, 96 Pac. 9.

7. Heidt v. Minor, 113 Cal. 385, 45 Pac. 700.

trial court has made express findings to the contrary.[8] On the other hand, however, an immaterial difference in the facts which does not change the rights of the parties in any degree does not render the doctrine inapplicable,[9] and the decision on the former appeal is conclusive where the only difference between the original and amended complaint consists in the greater particularity in which the latter sets forth the facts alleged in the former,[10] or, generally, where the amendment to the complaint states no new facts and adds nothing material to the pleading.[11] But the mere fact that the additional evidence on the second trial is cumulative is not ground for disregarding it, where the manner and bearing of witnesses are involved. When a decision on a former appeal as to the insufficiency of evidence to justify a decision has reference to questions of fact depending upon the credit to be given a witness or upon inferences of fact, and the trial court on the second trial makes the same findings, its decision will not be disregarded upon second appeal, where additional cumulative evidence was offered on the second trial.[12]

§ 558. Examining Record to Ascertain Identity of Facts.—In determining whether a decision on a former appeal is binding as the law of the case, the appellate court may examine the record thereon to ascertain if the facts on both appeals are the same and also what was there decided,[13] but it cannot consider the former record

8. Jacks v. Deering, 150 Cal. 272, 88 Pac. 909.

9. Duckworth v. Watsonville Water & Light Co., 170 Cal. 425, 150 Pac. 58; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078; Snyder v. Jack, 140 Cal. 584, 74 Pac. 139, 355; In re Cook's Estate, 83 Cal. 415, 23 Pac. 392; Daniel v. Smith, 75 Cal. 548, 17 Pac. 683.

10. Phelan v. San Francisco, 20 Cal. 39; Elliott v. Bunce, 10 Cal. App. 741, 103 Pac. 897.

11. Baker v. Brickell, 102 Cal. 620, 36 Pac. 950.

12. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; followed in Foley v. Northern California Power Co., 165 Cal. 103, 130 Pac. 1183.

13. Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174, 37 Pac. 657; Eversdon v. Mayhew, 85 Cal.

for any other purpose unless it is so stipulated by the parties.[14] It is not the duty of the appellate court, however, to compare the two records to ascertain the identity of the evidence, when the cause was retried upon amended pleadings, and it is not apparent that the evidence on the two trials was identical.[15] If, upon the second trial, the court below finds the facts to be different from the facts found at the first trial, the appellate court must be guided by the facts found if there is some evidence in support of them. It would not be justified in reviewing the record of the first trial to ascertain the relative weight of the proof and whether the trial court found correctly.[16]

§ 559. **Decisions Within the Rule Generally.**—To be binding as the law of the case it is, of course, necessary that the opinion on the former appeal be binding as a decision of the court.[17] It follows that opinions not concurred in by the requisite number of justices do not become binding as law of the case.[18] Upon the same principle, statements on a former appeal not concurred in by a majority of the court are not law of the case.[19] It is necessary also that the former decision be made in the same case in which the question is raised,[20] for, as was

1, 21 Pac. 431, 24 Pac. 382 (the transcript and briefs on the former appeal may be examined); Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131 (per Thornton, J., concurring); McKinlay v. Tuttle, 42 Cal. 570.

14. McKinlay v. Tuttle, 42 Cal. 570.

15. Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920.

16. Stockton Combined H. & A. Wks. v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565.

17. The constitution requires the concurrence of three justices to pronounce a judgment unless the judgment is rendered by the supreme court sitting in bank, in which case a concurrence of four justices is required.

18. Matter of Coburn, 165 Cal. 202, 131 Pac. 352; City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 124 Pac. 251; Daggett v. Southwest Packing Co., 155 Cal. 762, 103 Pac. 204; Estate of Mitchell, 126 Cal. 248, 58 Pac. 549; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70 (by supreme court on denying petition for hearing in that court).

19. Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; City of Napa v. Esterby, 76 Cal. 222, 18 Pac. 253.

20. Estate of Wickersham, 153 Cal. 603, 96 Pac. 311 (on an appeal

said above, in other cases, a decision is only authority to be followed and affirmed, or to be modified or overruled according to its intrinsic merits.[1] It has been contended that the doctrine has no application to an action of ejectment, but this contention was held untenable, as the question is not what is the effect of a judgment in ejectment when recovered, but what effect is to be given to the decision of the appellate court upon the second trial or appeal in the same case. It follows that the object for which the action is brought is immaterial as affecting the application of the doctrine of the law of the case.[2] Neither is it necessary that the judgment appealed from be one on the merits of the case. A decision rendered upon a demurrer to the complaint upon a former appeal is the law of the case on an appeal taken after a trial on the merits, when the facts found are substantially the same as those alleged in the complaint.[3] But, of course, the decision is only law of the case as to what was actually adjudicated.[4] Therefore, a decision upon an order granting a temporary injunction determining that the complaint, assuming its allegations to be true, is sufficient to support the injunction, would be law of the case on a subsequent appeal as to the sufficiency of the complaint. But such decision does not determine anything as to the merits of the case and does not conclude the court on a determination of the case on its merits.[5] When a decision operates as a judgment, it becomes the law of the case whether it is rendered upon full argument and consideration or otherwise. When a case is relied on as authority in other cases, this factor may be important,

by a son from a decree of distribution of the estate of his father, statements as to the son's right to inherit from his mother are not binding as law of the case on an appeal from a decree of distribution of the estate of the mother); Leese v. Clark, 20 Cal. 387.

1. See supra, § 555.

2. Leese v. Clark, 20 Cal. 387.

3. Little v. Caldwell, 112 Cal. 27, 44 Pac. 340.

4. See infra, § 566.

5. Beaudry v. Felch, 47 Cal. 183.

but it is otherwise when the doctrine of law of the case is involved.[6]

Ambiguity.—The conclusiveness of a decision is, however, impaired by ambiguity in its terms. Where the decision of the appellate court on a former appeal by inadvertence determines two principles of law standing in such opposition to each other as to be incapable of a harmonious construction, effect can be given to neither principle upon a subsequent appeal and the law of the case is not established.[7]

§ 560. Decision of Court of Last Resort.—The doctrine that a previous ruling has become the law of the case has no application except as to the decisions of appellate courts.[8] The doctrine clearly has no application to rulings of trial courts. If at the trial of a cause the court makes a ruling upon a certain point, the court is not bound by it if the same point arises again. On the contrary, the court may, and should, change its ruling if, in the meantime, it has become satisfied that it was erroneous.[9] But conceding that the doctrine of the case applies only to decisions of a court of last resort, when an appellant ceases to pursue his appeal from one appellate court to a higher, though he might do so, the decision of the court where he sees fit to rest is a final one within the meaning of the rule.[10] Such a decision is not only binding on the intermediate appellate court when the case is again brought before it,[11] but it is also binding

6. Leese v. Clark, 20 Cal. 387.

7. Gage v. Downey, 94 Cal. 241, 29 Pac. 635.

8. Lawrence v. Ballou, 37 Cal. 518.

9. De la Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717; Lawrence v. Ballou, 37 Cal. 518.

10. Hill v. Maryland Casualty Co., 28 Cal. App. 422, 152 Pac. 953; Silva v. Pickard, 14 Utah, 245, 47 Pac. 144.

11. Hill v. Maryland Casualty Co., 28 Cal. App. 422, 152 Pac. 953.

on the supreme court if the case is subsequently appealed to that court.[12]

§ 561. Erroneous Decision.—While there is some conflict of authority elsewhere as to whether an erroneous decision is binding as the law of the case, the rule is well established in California that it is immaterial whether the decision on the first appeal is erroneous. Right or wrong, it must be regarded as a final adjudication of the court and the law of the case when the case comes up on second appeal on the same facts.[13] Indeed, it is when the former rule is deemed erroneous that the doctrine of the law of the case becomes most important.[14] Accordingly, it has been said that the doctrine of the law of the case presupposes error in the enunciation of a principle applicable to the facts of a case under review by an appellate tribunal. It presupposes error because, if the governing principle of law had been correctly declared, there would be no occasion for the invocation of the doctrine. The sole reason for the existence of the doctrine is that the court having announced a rule of law applicable to a retrial of the facts, both parties upon that retrial are

12. Estate of Warner, 158 Cal. 441, 111 Pac. 352.

13. Westerfeld v. New York L. Ins. Co., 157 Cal. 339, 107 Pac. 699; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Moss v. Odell, 141 Cal. 335, 74 Pac. 999; People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; Thompson v. Felton, 54 Cal. 547 (per Thornton, J., concurring); Polack v. McGrath, 38 Cal. 666 (per Crockett, J., concurring); Page v. Fowler, 37 Cal. 100; Lucas v. San Francisco, 28 Cal. 591; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Haynes v. Meeks, 20 Cal. 288; Davidson v. Dallas, 15 Cal. 75; Gunter v. Laffan, 7 Cal. 588; Clary v. Hoagland, 6 Cal. 685; Dewey v. Gray, 2 Cal. 374; Lang v. Specht, 2 Cal. Unrep. 111; Hill v. Maryland Casualty Co., 28 Cal. App. 422, 152 Pac. 953; McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191; People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556. In City of Hastings v. Foxworthy, 45 Neb. 676, 34 L. R. A. 321, 63 N. W. 955, because the early Nebraska cases were based on California authority, the court examined the early California cases to the effect that an erroneous decision is binding as law of the case.

14. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

assumed to have conformed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal.[15] It must not be thought from this statement that the doctrine is confined to cases in which the first decision is erroneous. It goes that far if it becomes necessary to do so, but the last decision would be the same in a case where the first decision was not erroneous. The doctrine means simply this: that the court having once decided the law, and remanded the cause to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon the law, the appellate court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy.[16]

§ 562. **Obiter Dictum.**—The doctrine of the law of the case is restricted to decisions of the appellate court, and does not extend to obiter dicta; that is, to statements

15. Foley v. Northern California Power Co., 165 Cal. 103, 130 Pac. 1183; Allen v. Bryant, 155 Cal. 256, 100 Pac. 704; Kramm v. Stockton Electric R. R. Co., 10 Cal. App. 271, 101 Pac. 914; Wixon v. Devine, 80 Cal. 385, 22 Pac. 224.

16. Brett v. S. H. Frank & Co., 162 Cal. 735, 124 Pac. 437, in which the court, speaking through Shaw, J., says: "In the present case we are entirely satisfied with the law laid down on the former appeal." See, also, the following cases in which the former decision was approved as correct and held to be the law of the case: McBoyle v. Union Nat. Bank, 168 Cal. 263, 142 Pac. 837; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767 (where the court said that it saw no reason to question the correctness of the former decision, even if the matter were open for review); Turner v. Hearst, 137 Cal. 232, 70 Pac. 18; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Hartfield v. Alderete, 26 Cal. App. 604, 147 Pac. 991; Elliott v. Bunce, 10 Cal. App. 741, 103 Pac. 897; Woodside v. Tynan, 5 Cal. Unrep. 807, 50 Pac. 424, where the court said: "We are not only fully satisfied with the correctness of our former judgment, but, under well-established rules, we are also precluded from re-examining it upon this appeal."

as to points not tending to the decision of the point upon which the appeal was disposed of.[17] Statements of an appellate court upon points not presented in the record do not have binding force as an adjudication of the law of the case, even though they are asserted and argued by counsel.[18] In accordance with this rule, an appellate court is not bound by any discussion, on a former appeal, as to the weight and effect of certain evidence which would have been admissible had the party taken issue on new matter presented in a pleading, or by statements made with respect to probative facts tending to establish, modify or overcome ultimate facts admitted on the record, as such discussion and statements are clearly obiter.[19] So, also, it seems that the doctrine of the law of the case is not applicable to statements which, though not obiter in a strict sense, are closely allied thereto, such as statements casually made as to other portions of the case not under consideration at the time they are made.[20] On the other hand, the supreme court has refused to adopt the rule which confines the law of the case to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition of the case.[1] Indeed, it has been held that

17. Millsap v. Balfour, 158 Cal. 711, 112 Pac. 450; Ventura County v. Clay, 119 Cal. 213, 51 Pac. 189; Wixson v. Devine, 80 Cal. 385, 22 Pac. 224; Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212; Mulford v. Estudillo, 32 Cal. 131; Trinity County v. McCammon, 25 Cal. 117; City of Oakland v. Carpentier, 21 Cal. 642 (on petition for rehearing).

18. Millsap v. Balfour, 158 Cal. 711, 112 Pac. 450.

19. Mulford v. Estudillo, 32 Cal. 131.

20. Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200 (per Garoutte, J., concurring). Where a court in passing upon the validity of an instruction says the plaintiff's testimony tends to prove his side of the case, such statement is not binding on a subsequent appeal so as to preclude the court from declaring it insufficient to establish a prima facie case.

1. Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Porter v. Muller, 112 Cal. 355, 44 Pac. 729; Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212; People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556.

a decision upon a point which arises in a case and is decided is not a dictum, although it is not necessary to the decision of the appeal,[2] or that, at least, an opinion made in deciding a point argued by counsel but not necessary to the disposition of the case, if dictum at all, is a judicial as distinguished from obiter dictum.[3] Accordingly, when a reversal is placed on several grounds, any one of which is sufficient to warrant a reversal, the decision is the law of the case upon all the grounds upon which it is based. Indeed, a contention that the decision is obiter as to any one ground is equally applicable to the others.[4] Finally, a party who requests the court to pass upon a point will not be heard afterwards to assert that the decision was dictum, even though the question was not necessarily involved.[5]

§ 563. Parties Concluded.—In actions in personam, a decision of a court of appeal is conclusive upon parties to the appeal whose rights have been determined, but it is not conclusive upon persons not parties to the appeal whose rights are not passed upon. Thus, where the property of an indorser of a note is wrongfully taken and sold under an execution against the principal debtor, and the indorser brings an action for damages against the principal debtor and the persons who wrongfully caused his property to be taken and sold, a decision upon an appeal by the principal debtor that, as he was not a party to the seizure, the indorser had only a right of contribution

2. Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212.

3. People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556.

4. Clary v. Rolland, 24 Cal. 147; People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556 (in an action on a statutory bond, a decision of the appellate court upholding the constitutionality of the statute under which the bond was given is binding as the law of the case, though the court also held that, admitting the bond was a statutory bond, the right to sue thereon does not rest alone on the statute, as the bond was voluntarily made and is therefore enforceable as a common-law bond).

5. San Francisco v. Spring Valley Water Works, 53 Cal. 608 (constitutionality of statute).

against him, is not the law of the case so as to preclude a recovery of damages against the remaining defendants who had wrongfully seized the property and whose rights were not considered or passed upon on the former appeal.[6] A decision of an appellate court cannot be conclusive in a different case with different parties. As to such parties a decision is only authority to be followed and affirmed, or modified or overruled according to its intrinsic merits.[7] Actions in rem, however, seem to be governed by a somewhat distinct principle. The construction of a will made on an appeal from a decree of partial distribution is rendered in a proceeding and is binding upon all the parties in the matter of the construction to be given the will. Thus, a construction of a will on such an appeal taken by a grantee of a claimant thereunder is binding upon the claimant as the law of the case, and also upon his successors in interest when the same question is presented by them on an appeal from a final decree of distribution, and this notwithstanding the fact that the claimant and his successors in interest were not parties to the first appeal.[8]

§ 564. Questions Concluded Generally.—A decision is the law of the case only as to the questions actually or impliedly determined and decided by the appellate court. No point in a case can be said to have been decided except the one specifically dealt with and such others as may be said to be necessarily determined by the decision of the point under discussion.[9] It is necessary,

6. March v. Barnet, 121 Cal. 419, 66 Am. St. Rep. 44, 53 Pac. 933.

7. In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. See Kerns v. Dean, 77 Cal. 555, 19 Pac. 817, where the court says that the identical question raised in the case at bar was decided in the related case of Kerns v. McKean, 76 Cal. 87, 18 Pac. 122. "While the ruling therein may not be absolutely the law of the case in the case at bar, yet, in view of the fact that the questions are identical, it should be held conclusive here."

8. Estate of Carothers, 168 Cal. 691, 144 Pac. 957 (per Melvin, J.).

9. Carpy v. Dowdell, 131 Cal. 495, 63 Pac. 778 (a decision that a mortgagee is estopped from foreclosing

therefore, in each particular case to examine the record on the former appeal to ascertain what was there decided.[10] When, for example, several errors are assigned as grounds for reversal, and the appellate court in reviewing the cause comments and passes on certain errors only, and finds them sufficient to warrant a reversal, its decision is law of the case as to the errors actually passed on only, and not as to the other errors assigned but not considered. Therefore, instructions objected and excepted to on the former trial which were not commented on in the opinion on the first appeal reversing the judgment may be considered on a second appeal if given on the second trial and properly brought up for review.[11] When, however, a particular objection has been urged on several appeals taken in a cause without receiving any notice, it may be assumed that the point has been considered and decided adversely, for if the point had been good, it would undoubtedly have been noticed.[12] On the other hand, when, instead of reversing the judgment of the court below, the appellate court affirms it, the decision necessarily determines that none of the errors assigned warrants a reversal, and precludes a subsequent review of all such errors.[13] So, also, when a motion to dismiss an appeal is based upon several grounds, an order overruling the motion is a decision that none of the grounds set up was fatal to the appeal. Even though all the grounds were not argued or directly passed on, the decision necessarily involves and determines all of them.[14]

his mortgage upon part of the property mortgaged is not law of the case so as to preclude his foreclosing his mortgage on the balance of the property); Parkin v. Grayson-Owen Co., 25 Cal. App. 269, 143 Pac. 257. See infra, § 567, as to implied decision on question of jurisdiction.

10. See supra, § 558.

11. Parkin v. Grayson-Owen Co., 25 Cal. App. 269, 143 Pac. 257.

12. Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100.

13. See infra, § 568, as to effect of a decision upholding a complaint as against a general objection.

14. Lang v. Specht, 2 Cal. Unrep. 111.

§ 565. Questions of Law and Fact.—Since it is not within the province of an appellate court to make findings of fact, it follows that the doctrine of the law of the case is limited to questions of law and has no application to questions of fact.[15] For example, where in an action of forcible entry and detainer it is held, as a question of fact, that the possession of the plaintiff was as the agent of another and not in his own right, and, as a principle of law from this fact, that the possession of the agent is the possession of the principal for the purpose of the action, and that the action should have been brought in the name of the latter, the determination of this principle of law becomes the law of the case, but the question of fact whether or not the plaintiff was the agent of a third party is liable to be changed by further evidence showing a true and different state of facts. The action of the appellate court upon this question of fact does not operate as a bar or estoppel upon the plaintiff from showing the true facts of the case.[16] The doctrine of the law of the case is applicable to all questions of law, whatever may be their character.[17] It applies to controverted questions of abstract law,[18] and also to questions of a public nature involving great interests; as, for example, the construction of an act of Congress. While the importance of the questions involved should induce a careful consideration in the first instance, it can have no effect upon the conclusiveness of the decision when made.[19] Accordingly, the decisions of the following questions have been held to be binding as law of the

15. Moore v. Trott, 162 Cal. 268, 122 Pac. 462 (a finding as to fact of delivery of deed is not law of the case); Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; People v. Hamilton, 103 Cal. 488, 37 Pac. 627 (a criminal case); Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Mitchell v. Davis, 23 Cal. 381; Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 Pac. 760.

16. Mitchell v. Davis, 23 Cal. 381.

17. Leese v. Clark, 20 Cal. 387.

18. Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516.

19. Leese v. Clark, 20 Cal. 387.

case on a subsequent appeal, the facts on both appeals being the same: The construction of written instruments;[20] sufficiency of pleadings;[1] the admissibility[2] and effect of evidence;[3] the sufficiency of the findings to support the judgment,[4] and the effect of a judgment as res adjudicata.[5] An order denying a motion to dismiss an appeal is the law of the case on the points involved in the motion, when the order becomes final.[6] So, also, a decision is binding upon a second appeal as law of the case which declares that certain facts do not constitute a lawful delivery of a deed,[7] or which declares that certain findings showed such an execution of a parol agreement within the statute of frauds as entitled the promisee to enforce it.[8]

20. Estate of Carothers, 168 Cal. 691, 144 Pac. 957 (construction of a will); Krumdick v. White, 107 Cal. 37, 39 Pac. 1066; More v. Calkins, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583 (construction of deed of trust); Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790 (construction of a will); Sharpstein v. Friedlander, 63 Cal. 78 (a decision establishing the legal effect of an agreement with reference to a right asserted under it becomes the law of the case); Poorman v. D. O. Mills & Co., 43 Cal. 323 (construing a certificate of deposit to be a promissory note); Leese v. Clark, 20 Cal. 387 (construction of a contract or of a statute); Keifer v. Myers, 14 Cal. App. 338, 111 Pac. 1038; Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713 (construction of cropping lease).

1. See infra, § 568.

2. See infra, § 569.

3. Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Brusie v. Gates, 96 Cal. 265, 31 Pac. 111 (a decision as to the effect of the testimony of a constable as to his actions in giving notice of an attachment to the occupant of land is law of the case on a subsequent appeal); Jaffe v. Skae, 48 Cal. 540; Davis v. Pacific Improvement Co., 7 Cal. App. 452, 94 Pac. 595 (a decision that tax deeds were evidence under the statute that the delinquent list was prepared for the years for which the land was sold for taxes is the law of the case).

4. Lambert v. Bates, 148 Cal. 146, 82 Pac. 767.

5. People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54.

6. Hartfield v. Alderete, 26 Cal. App. 604, 147 Pac. 991.

7. Moore v. Trott, 162 Cal. 268, 122 Pac. 462.

8. Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235.

§ 566. Error Existing but not Presented or Considered. The doctrine of the law of the case is limited to decisions upon questions which were actually presented and considered upon the former appeal, and does not extend to points of law which might have been raised but were not presented and determined.[9] The doctrine does not extend to new points presented upon a second appeal,[10] and particularly to points upon which the court on the former appeal expressly declined to pass,[11] or as to which it withdrew any opinion it may have expressed.[12] Such questions are open and may be urged and reviewed upon a subsequent appeal. Upon this principle, a decision upholding the validity of an instrument as against a specific objection is not the law of the case in respect to its validity and sufficiency in other particulars not raised or considered on the former appeal.[13] Again, since ordinarily, a respondent is only interested on an appeal in upholding the judgment appealed from, and is not entitled to present for consideration errors committed by a trial court, the decision of the appeal does not, on a sub-

9. Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; People v. Hamilton, 103 Cal. 488, 37 Pac. 627 (a criminal case); Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876.

10. Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049 (it is a necessary corollary of the doctrine of the law of the case that it is not binding upon the second hearing except as to questions which involve and are controlled by the same principle); Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; People v. Hamilton, 103 Cal. 488, 37 Pac. 627 (a criminal case); McLeran v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879 (where the validity of a lease was not questioned on the former appeal, the question may be determined upon a subsequent appeal); Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31; Knight v. Hall, 28 Cal. App. 435, 152 Pac. 952.

11. Estate of Hall, 154 Cal. 527, 98 Pac. 269.

12. Welton v. Cook, 61 Cal. 481; City of Oakland v. Carpentier, 21 Cal. 642.

13. Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31.

sequent appeal from a judgment entered against him in pursuance to the mandate of the appellate court, preclude him from presenting for review exceptions taken by him on the trial of the action.[14] This rule is subject to an apparent exception where the court on the former appeal must necessarily have passed on a particular question, though not expressly presented or considered. For example, since a court must determine that it has jurisdiction of a case before it can pass upon the merits thereof, a court of review must be presumed to have considered this question when it has entertained a case and reversed it on the merits, and the question of lack of jurisdiction cannot afterwards be presented for consideration, even though it may not actually have been considered on the former appeal.[15] So, also, since it is the duty of the court before sustaining an order overruling a general objection to consider not only the particular objections which are urged in support thereof, but also all objections which might have been urged, a decision upholding a pleading or proceeding as against a general objection is law of the case as to all objections which might have been considered, although not in terms referred to.[16]

§ 567. **Jurisdiction.**—The rule of the law of the case extends not only to questions of law arising in a case, but to questions of jurisdiction also, and precludes the court on second appeal from reviewing the question whether it had jurisdiction of the first appeal. And under the rule that the prior decision is the law of the case though it may be erroneous, the prior decision is conclusive upon

14. Sala v. City of Pasadena, 162 Cal. 714, 124 Pac. 539; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69; Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 Pac. 876 (where on an appeal by the plaintiff without a bill of exceptions a judgment for him is directed, and the defendant appeals from the latter judgment with a bill of exceptions, such exceptions will be considered on the second appeal). See supra, § 492.

15. See infra, § 567.

16. See infra, § 568.

subsequent proceedings in a case, though the appellate court did not have jurisdiction of the case on the first appeal. Thus, in an early case which arose in the county court, and was appealed to the district court and then to the supreme court, the decision of the supreme court therein was held binding upon the rights of the parties, notwithstanding the fact that it was subsequently decided that the district court had no appellate jurisdiction, and that therefore the supreme court had no jurisdiction of the appeal. It was further held to be immaterial that the question of jurisdiction was not raised and passed on in terms on the appeal, as it must always be implied that a court at the very first decides the question of its jurisdiction, and having entertained the case on its merits, the question of jurisdiction must be considered as having been decided, although not in fact raised or considered.[17]

§ 568. Pleadings.—The doctrine of the law of the case is applicable to decisions of questions of law relating to pleadings in civil actions. Accordingly, a decision as to the propriety of the action of a trial court in allowing the filing of an amended complaint[18] or construing the pleadings[19] is the law of the case on a subsequent appeal, the pleadings not being materially changed. The same is true of a decision as to the sufficiency of a complaint to state a cause of action.[20] It often happens that more

17. Clary v. Hoagland, 6 Cal. 685.

18. Conde v. Sweeney, 16 Cal. App. 157, 116 Pac. 319.

19. Auburn Opera House & P. Assn. v. Hill, 113 Cal. 382, 45 Pac. 695.

20. Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675; Estate of Couts, 100 Cal. 400, 34 Pac. 865; Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (opinion in department); Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212; Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676; Lucas v. San Francisco, 28 Cal. 591; Klauber v. San Diego St. Car Co., 4 Cal. Unrep. 289, 34 Pac. 516 (holding that, on an appeal by a plaintiff from a judgment on the judgment-roll, in which a judgment in accordance with the prayer of the complaint is directed, the question whether the complaint states a cause

than a single reason may be assigned and urged in support of the general objection that a pleading is bad for paucity of facts. When it is urged on appeal that the trial court erred in overruling such a general objection, it is the duty of the court of review to take up the pleading assailed by its four corners and measure its averments by the full breadth of the objection interposed and then decide, whether for the reason or reasons, or for other reasons not advanced, the general objection is well taken. A decision therefore, that the complaint is sufficient as against the general objection is law of the case as to all the reasons which might have been urged in support of it, notwithstanding the fact that all are not mentioned in the opinion. Nor is it material in this connection that the objection on the former appeal was presented in a different form, as where on the former appeal the objection was urged by an objection to the reception of evidence and on the second appeal by demurrer, for in either case the ultimate question for the determination of the appellate court is the same, namely, the sufficiency of the complaint.[1] Since the question as to the right of the plaintiff to maintain an action may be raised by a general demurrer to the complaint, it follows that a decision upholding a complaint as against a general demurrer is law of the case as to the plaintiff's right to sue.[2]

§ 569. **Evidence.**—A decision as to the admissibility of evidence is a decision of a question of law and is

of action is decided and becomes the law of the case though the demurrer is not included in the judgment-roll); McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191; Condo v. Sweeney, 16 Cal. App. 157, 116 Pac. 319; Koyer v. Willmon, 12 Cal. App. 87, 106 Pac. 599; Elliott v. Bunce, 10 Cal. App. 741, 103 Pac. 897 (holding a decision that a complaint shows on its face that a claim is stale in equity and is demurrable is law of the case); Lowe v. Ozmun, 3 Cal. App. 387, 86 Pac. 729.

1. McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191.

2. Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676.

law of the case, and is conclusive when the same question is raised on a subsequent appeal.[3] So, also, a decision whether the evidence before the trial court was sufficient to justify a decision drawn therefrom conferring or withholding a legal right for either party precludes a review of the question on a second appeal if the evidence is substantially the same.[4] Accordingly, therefore, if upon the former appeal it is decided that upon the evidence before the court the plaintiff should have had judgment in his favor, that decision is the law of the case upon a subsequent appeal, unless upon the retrial the defendant proves some material fact he omitted to prove on the first trial.[5] The doctrine is applicable also to the question whether the evidence is sufficient to go to the jury. Thus, where on a review of a ruling on a motion for a nonsuit it is decided that the plaintiff's evidence shows contributory negligence as a matter of law, and that the motion should have been granted, the decision is binding on a subsequent appeal if the evidence for the plaintiff does not warrant a different conclusion.[6] Of course, if the evidence on the second trial is so distinct as to render the granting of a nonsuit thereat erroneous,

3. Kerns v. Dean, 77 Cal. 555, 19 Pac. 817; Smith v. Sinbad Development Co., 15 Cal. App. 166, 113 Pac. 701; Hubbard v. Lee, 10 Cal. App. 477, 102 Pac. 528.

4. James v. E. G. Lyons Co., 147 Cal. 69, 81 Pac. 275; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349; King v. La Grange, 61 Cal. 221; Polack v. McGrath, 38 Cal. 666; Woodside v. Tynan, 5 Cal. Unrep. 807, 50 Pac. 424; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516.

5. King v. La Grange, 61 Cal. 221.

6. Limberg v. Glenwood Lumber Co., 145 Cal. 255, 78 Pac. 728; McGraw v. Friend & Terry Lumber Co., 133 Cal. 589, 65 Pac. 1051, in which on an objection that a decision as to a question of fact does not become the law of the case it was said: "Here, however, the appeal is from a nonsuit granted by the trial court, and if the court erred in granting it, it is an error of law. . . . The decision upon the former appeal, therefore, became the law of the case, unless the evidence upon the second trial was so far different as to require a different conclusion."

the doctrine does not apply.[7] When an appellate court examines the evidence in a case and decides that it is in substantial conflict so as to preclude a disturbance of the finding of the trial court or verdict of the jury, the decision becomes the law of the case, and is binding upon the appellate court when the case is again before it upon the same evidence. The fact that the finding of the trial court or the verdict on the second trial is diametrically opposite the finding on the first trial on the same evidence is immaterial, because to say that a finding cannot be disturbed where the evidence is substantially conflicting is to say that if the finding were the other way, the same conflict would equally preclude its disturbance.[8]

O. DETERMINATION AND DISPOSITION OF CAUSE.

I. DECISION IN GENERAL.

§ 570. Scope and Extent.—Section 53 of the Code of Civil Procedure provides in part as follows:

"The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to he had."[9]

And the constitution, in the creation of district courts of appeal, has expressly provided "that all statutes now in force allowing, providing for or regulating appeals to the supreme court shall apply to appeals to the district court of appeal."[10] The supreme court or a district court of appeal, therefore, may not only affirm the judg-

7. Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713.

8. Raymond v. Glover, 144 Cal. 548, 78 Pac. 3. See supra, § 545.

9. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; In re Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742.

10. Const., art. VI, § 4; Machado v. Machado, 26 Cal. App. 16, 145 Pac. 738.

ment appealed from, but it may also modify it by eliminating some portion of it, or by adding something to it, leaving the remaining part of the judgment below to stand in full force and effect from the date of its original entry or rendition; or it may reverse the judgment, which means to entirely vacate it, and may remand the cause for a new trial; or if a new trial is not necessary, it may upon the reversal remand it, with directions to the lower court to enter a particular judgment.[11] On an appeal from a judgment the court may correct all errors therein detrimental to the appellant, including those portions which are in excess of the powers of the trial court.[12] But there can be no reversal or modification of that part of a decree in favor of persons not made parties to the appeal.[13] Upon an appeal from a judgment or order, the court cannot reverse another judgment or order not appealed from,[14] unless it is necessary to render its judgment effectual.[15] And upon an appeal from a part of a judgment or order the court will not reverse parts from which no appeal has been taken, unless so intimately connected with the part appealed from that the appeal is really from the whole judgment.[16]

The amendment to section 1714 of the Code of Civil Procedure abolishing new trials in probate proceedings except in will contests does not deprive the supreme court

11. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196 (per Shaw, J.).

12. Noble v. Superior Court, 109 Cal. 523, 42 Pac. 155.

13. McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333; Latham v. Los Angeles, 83 Cal. 564, 23 Pac. 1116; Little v. Superior Court, 74 Cal. 219, 15 Pac. 731; Nichols v. Dunphy, 58 Cal. 605; Lake v. Tebbitts, 56 Cal. 481. See supra, § 492, as to who may complain of error. See infra, § 586, as to reversal in part.

14. Upon an appeal from an order granting a new trial, the appellate court has no jurisdiction to reverse the judgment; In re Bills' Estate, 7 Cal. Unrep. 174, 74 Pac. 704.

15. On a reversal of an order denying a change of venue, the court may reverse a judgment rendered against the appellant before the reversal of the order. Howell v. Thompson, 70 Cal. 635, 11 Pac. 789.

16. Whalen v. Smith, 163 Cal. 360, 125 Pac. 904. See supra, § 475, and see infra, § 590.

of the right to examine the record and direct the lower court to do anything which may be proper in the exercise of its probate jurisdiction. The court upon an appeal from a decree of distribution is not limited, therefore, to discovery of discrepancies between the findings and decree and a modification of the decree to conform to the findings.[17]

The decision of the court as to the form of its judgment or mandate, and as to what shall be the future proceedings in the court below, is a part of the duty of the court, and it is presumed to have received the same consideration as any other part of the case.[18]

§ 571. Right of Judge not Present at Argument to Participate.—The constitution provides that—

"the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause, shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary."[19]

While this provision does not forbid the pronouncing of a judgment in bank unless concurred in by four of the justices who were physically present at an oral argument, or require that all the judges qualified to "sit" shall literally "hear" an argument,[20] whenever there is an oral argument, under this provision only the justices who are present at such argument are authorized to take part in the decision of the case,[1] unless parties

17. Estate of Vanderhurst, 171 Cal. 552, 154 Pac. 5.

18. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

19. Const., art. VI, § 2.

20. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134. See supra, § 459, as to submission without argument. See infra, § 594, as to vacating judgment without rehearing granted.

1. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134; Fair v. Angus, 6 Cal. Unrep. 283, 57 Pac. 385 (setting aside the order of submission as it was deemed important that all the justices participate in the decision and ordering the cause resubmitted to the full court).

stipulate that a justice not present at argument may participate, it being held that violation of this requirement is a mere error or irregularity which may be waived by the parties.[2]

Submission on briefs.—When a cause is submitted on the briefs alone, all the justices have an equal opportunity to read the argument, and are deemed to be present at the argument within the meaning of the constitution. And all or any of them are qualified to join in the decision.[3]

§ 572. Effect of Change of Law.—It is a general rule that it is the province of an appellate court to review the judgment of an inferior court as of the time when it was rendered,[4] and decide whether the judgment or order made by the court below was correct or erroneous at the time it was made or rendered.[5] This is in accord with the rule that the courts do not usually give statutes a retroactive effect.[6]

But when jurisdiction of the appellate court is founded upon a statute, the repeal of the statute takes away its jurisdiction and causes all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative, unless special provision is made to the contrary.[7] So, also, the repeal of a statute without a saving clause, pending an appeal which has the effect of suspending the judgment appealed

2. Blanc v. Bowman, 22 Cal. 23. See Luco v. De Toro, 88 Cal. 26, 11 L. R. A. 543, 25 Pac. 983, vacating the decision, it appearing such stipulation was not entered into.

3. Philbrook v. Newman, 148 Cal. 172, 82 Pac. 772.

4. See supra, § 474, and cases cited infra, this section.

5. Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259; Hancock v. Thom, 46 Cal. 643; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

6. See 2 Ruling Case Law, 182; 25 Ruling Case Law, 787; and see STATUTES.

7. People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866; First Nat. Bank v. Henderson, 101 Cal. 307, 35 Pac. 899. See 25 Ruling Case Law, 937.

from, deprives the parties of all rights thereunder except, of course, such as may not be divested by legislative changes in the law.[8] If, therefore, a judgment was wrong on the law as it stood at the time of its rendition, the judgment will not be reversed if the law has been repealed, because if the case is remanded, the trial court must recognize the repeal and conform on the second trial to the law as it then is, and not to the law as it may have been at the time of the first trial.[9] On the other hand, a judgment rightful when entered will be reversed if it cannot be affirmed because in violation of the present existing law.[10] This rule is not applicable, however, when the judgment has become final and the appeal does not suspend its operation.[11]

§ 573. Effect of Repeal of Statutes Imposing Penalties. Since there can be no vested right in a penalty until it has been reduced to final judgment, the repeal without a saving clause of a statute imposing a penalty pending an appeal which suspends the judgment will deprive the appellate court of any power to render a judgment by which

8. People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866.

9. Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821.

10. United States v. Schooner Peggy, 1 Cranch (U. S.), 103, 2 L. Ed. 49 (per Marshall, C. J.).

11. People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866; Nofziger Lumber Co. v. Waters, 10 Cal. App. 89, 101 Pac. 38.

Since an appeal from an order denying a motion for a new trial, formerly allowed in this state, was a separate and independent appeal, which in no way suspended the judgment or interfered with its finality, the repeal of the statute conferring a right of action pending an appeal from such an order, without supersedeas or stay bond, did not have the effect of destroying the judgment affirmed on a direct appeal, or the right of the appellant to be heard upon his motion for a new trial, though, if the appeal should be granted, it necessarily had the effect of vacating the judgment, and then, by virtue of the repeal, the action could no longer be prosecuted; People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 Pac. 866.

the penalty may be enforced.[12] Thus, where in an action by a bank, it is established by the defendant that the bank failed to file certain statements required by statute under penalty that it could not maintain any action, and the court, notwithstanding this fact, renders judgment for the bank, a repeal of the statute pending an appeal from the judgment deprives the defendant of the defense it conferred upon him.[13] So, also, when an act authorizing a stockholder of a domestic corporation to recover from its directors a penalty for failure to comply with its provisions is repealed pending a judgment given thereunder, the repeal prevents further prosecution of the litigation and requires a reversal of the judgment.[14]

§ 574. Effect of Death or Bankruptcy of Party.—The death of a plaintiff pending an appeal from a judgment in his favor does not abate the action or affect the validity of the judgment.[15] The death of a party after argument or submission of a case upon appeal does not constitute any ground for delaying a decision or departing from the ordinary course of procedure, except as to the entry of judgment, which should be as of a day anterior to his death.[16] If the court, being in ignorance of the death, does not render its judgment as of a day prior thereto, it will correct the error in this respect,[17] unless it has lost jurisdiction of the cause by the issuance of its re-

12. Ball v. Tolman, 135 Cal. 375, 87 Am. St. Rep. 110, 67 Pac. 339; Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788, 54 Pac. 259; Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821; First Nat. Bank v. Henderson, 101 Cal. 307, 35 Pac. 899 (per Harrison, J.). See STATUTES.

13. First Nat. Bank v. Henderson, 101 Cal. 307, 35 Pac. 899.

14. Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821.

15. See ABATEMENT AND REVIVAL, vol. 1, p. 76.

16. Estate of Dolbeer, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695 (appellant); McPike v. Heaton, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179 (appellant); Lucas v. Provines, 130 Cal. 270, 62 Pac. 509 (respondent); Ede v. Cuneo (Cal.), 55 Pac. 772; Holloway v. Galliac, 49 Cal. 149; Savings & L. Society v. Gibb, 21 Cal. 595; Black v. Shaw, 20 Cal. 68 (appellant).

17. Holloway v. Galliac, 49 Cal. 149; Black v. Shaw, 20 Cal. 68.

mittitur.[18] The rule is different if the death occurs previous to argument. In that event further proceedings can only be had upon leave given after suggestion of the death is made.[19]

Bankruptcy.—The filing in the appellate court of an adjudication of the bankruptcy of the defendant rendered after the taking of the appeal does not stay the proceedings upon appeal as the judgment appealed from is a final judgment within the meaning of the Bankruptcy Act.[20]

II. AFFIRMANCE.

§ 575. In General—*Failure to appear, argue or file brief.*—While a failure to file a brief within the time prescribed by the rules of the supreme court is ground for a dismissal on motion of the respondent,[1] in the absence of such motion, the judgment will be affirmed without an examination of the record, where the appellant neither makes an oral argument nor files any brief.[2]

Correct result.—It is a general rule that a decision of a trial court which is correct as a matter of law will be

18. Martin v. Wagner, 124 Cal. 204, 56 Pac. 1023 (the judgment is not void and the court could not recall its remittitur). But compare Holloway v. Galliac, 49 Cal. 149, where the remittitur was recalled and the judgment corrected. See infra, § 633, as to effect of issuance of remittitur.

19. Black v. Shaw, 20 Cal. 68.

20. Merritt v. Glidden, 39 Cal. 559, 2 Am. Rep. 479. See supra, § 416, as to insolvency as excusing the filing of a brief.

1. See supra, § 416.

2. Peek v. Peek, 75 Cal. 298, 17 Pac. 213; Kelly v. Morgan, 54 Cal. 604; Mix v. Boothe, 54 Cal. 589; Hickinbotham v. Monroe, 28 Cal. 489 ("A like disposition will be made of all cases similarly situated, when taken up for decision in their proper order"); Hutton v. Reed, 25 Cal. 479; Edmondson v. Alameda County, 24 Cal. 349; Bearce v. Davis, 38 Cal. App. 274, 176 Pac. 62 ("we might affirm the judgment on the assumption that the appeal had been abandoned"); McNutt v. Pabst, 23 Cal. App. 232, 143 Pac. 68. See Constant v. Ward, 1 Cal. 333, as to motion for affirmance under former rule XII. See supra, § 416, as to necessity for brief.

affirmed, although the trial court arrived at its conclusion by an erroneous process of reasoning.[3]

Affirmance of void judgment.—The affirmance of a void judgment imparts no validity to it,[4] especially if such an affirmance is put upon grounds not touching its validity.[5]

§ 576. By Equal Division of Court.—Where one of the justices of the supreme court is disqualified from participating in the decision, and the others are equally divided, the mere failure to agree, does not have the effect, ipso facto, of an affirmance as the constitution requires the concurrence of four justices to pronounce judgment in bank.[6] In such case the court, in consideration of expediency and the presumption of correctness attaching to the judgment of the trial court, will affirm the judgment where there is no probability of any change in the opinion of those constituting the court, or of any immediate change in the personnel of the appellate court.[7] But where there is a prospect of an immediate change in the personnel of the court, the cause will be retained for presentation on the merits before the new court.[8] When, however, affirmative action is necessary, the equal division of the court necessitates a denial of relief. For example, when upon an appeal from a judgment in a mandamus proceeding, the court is equally divided as to the issuance of the writ directly from the appellate court instead of

3. See supra, §§ 476–479, inclusive.

4. Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537; Ball v. Tolman, 135 Cal. 375, 87 Am. St. Rep. 110, 67 Pac. 339; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295.

5. Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295.

6. Luco v. De Toro, 88 Cal. 26, 11 L. R. A. 543, 25 Pac. 983.

7. Santa Rosa City R. R. v. Central Street Ry. Co., 112 Cal. 436, 44 Pac. 733; Frankel v. Deidesheimer, 93 Cal. 73, 28 Pac. 794; Ayres v. Bensley, 32 Cal. 632; Smith v. Ferries & C. H. Ry. Co., 5 Cal. Unrep. 889, 51 Pac. 710; Kimball v. Semple, 1 Cal. Unrep. 554.

8. Luco v. De Toro, 88 Cal. 26, 11 L. R. A. 543, 25 Pac. 983.

remitting the cause to the trial court in the usual way, the latter course will be followed.[9]

§ 577. Appeal Frivolous or Devoid of Merit.—While an appeal will not be dismissed ordinarily upon the ground that it is frivolous or sham, and devoid of merit,[10] this is ground for an affirmance of the judgment.[11] In affirming a judgment upon the ground that the appeal was taken for delay, the court may add to the costs such damages as may be just. It is so provided in the Code of Civil Procedure.[12] Where an appeal is groundless, the appel-

9. McCauley v. Brooks, 16 Cal. 11.

10. See supra, § 436.

11. Cravens v. Dewey, 1 Cal. Unrep. 89.

12. Code Civ. Proc., § 957; Los Angeles Paving Co. v. Los Angeles Foundry Co., 181 Cal. 685, 186 Pac. 593; Estate of Wall, 60 Cal. Dec. 140, 191 Pac. 687 (where the value of the estate is seventy-five thousand dollars, a penalty of two hundred dollars cannot be deemed excessive); Lieman v. Golly, 178 Cal. 544, 174 Pac. 33 (action to set aside deeds); Foster v. Branen, 178 Cal. 118, 172 Pac. 382 (imposing one hundred dollars as damages); Laughlin v. Pacific Coast Motor Car Co., 177 Cal. 86, 169 Pac. 996 (awarding fifty dollars damages); Miller v. Oliver, 174 Cal. 404, 163 Pac. 355 (affirming the judgment with one hundred dollars damages); Roberts v. Buckingham, 172 Cal. 458, 156 Pac. 1018; Lapique v. Agoure, 170 Cal. 79, 148 Pac. 517 (where the only motive of the appeal was to keep alive an action on a claim utterly without foundation); Santa Rosa Bank v. Paxton, 149 Cal. 195, 86 Pac. 193 (affirming judgment with costs and one hundred dollars damages); Hearst v. Hart, 128 Cal. 327, 60 Pac. 846 (affirming judgment with one hundred dollars damages); Henehan v. Hart, 127 Cal. 656, 60 Pac. 426 (affirming judgment with fifty dollars damages); Langan v. Langan, 86 Cal. 132, 24 Pac. 852; Goodcell v. Davis, 62 Cal. 617 (with twenty-five per cent damages); Adler v. Winkle, 53 Cal. 187 (judgment affirmed with ten per cent damages); Kincaid v. Johnson, 47 Cal. 618 (affirming a judgment for ninety dollars with fifty per cent damages); Perkins v. Patrick, 45 Cal. 393 (affirming judgment with twenty per cent damages); Meerholz v. Sessions, 9 Cal. 278 (affirming the judgment with twenty per cent damages); Meyers v. Trujillo, 3 Cal. Unrep. 505, 30 Pac. 579; De Pena v. Trujillo, 3 Cal. Unrep. 504, 30 Pac. 560; Dunphy v. Heinmann, 2 Cal. Unrep. 851, 17 Pac. 5 (affirming judgment with fifty dollars damages); Heney v. Alpers, 2 Cal. Unrep. 164 (affirming judgment with twenty per cent damages); Wheeler v. Turner, 1 Cal. Unrep. 798 (with ten per cent damages); Dwyer v. California Steam Nav. Co., 1 Cal. Unrep. 442 (with five

lant cannot avoid the imposition of damages by a mere assertion that he believed there was merit in his case when the slightest investigation would have assured him to the contrary. Such assurance should come from the record or at least find some semblance of support therein.[13] Where a frivolous appeal is taken by a personal representative, damages may be assessed against him personally.[14] It is not necessary to give damages, however, when the appellant only stayed his own judgment from drawing interest.[15]

An appeal is clearly frivolous where the only foundation for an appeal is a claimed preponderance of evidence in favor of the appellant, and the findings are directly and substantially supported by the evidence.[16] So, also, an appeal is frivolous where all the errors assigned are not supported by the record,[17] or where the only matter urged is well established,[18] or when the only error as-

per cent damages); Dillon v. Kelly, 1 Cal. Unrep. 251 (with fifteen per cent damages); Parburt v. Monroe, 1 Cal. Unrep. 72 (with ten per cent damages); Spencer v. Barney, 1 Cal. Unrep. 56 (with ten per cent damages); Berri v. Minturn, 1 Cal. Unrep. 50 (with five per cent damages); De Wolf v. Bailey, 1 Cal. Unrep. 37 (with ten per cent damages); Flynn v. Travers, 1 Cal. Unrep. 27 (with twenty per cent damages); City Street Imp. Co. v. Silvershield, 40 Cal. App. 597, 181 Pac. 393 (imposing fifty dollars damages); Moore v. Lauff, 30 Cal. App. 452, 158 Pac. 557; Goff v. Healey, 2 Cal. App. 95, 83 Pac. 89 (affirming judgment with one hundred dollars damages).

13. Younglove v. Cunningham, 5 Cal. Unrep. 281, 43 Pac. 755. See Lemon v. Rucker, 80 Cal. 609, 22 Pac. 471 (awarding damages for delay although attorney acted in good faith). But see Dunn v. Warden, 28 Cal. App. 202, 151 Pac. 671 (not awarding damages where the appellant who acted as his own attorney could not be said to be cognizant of the want of merit in his appeal).

14. Estate of Snowball, 156 Cal. 235, 104 Pac. 446.

15. Howard v. Low, 1 Cal. Unrep. 82.

16. Holcomb v. Breitkreutz, 180 Cal. 17, 179 Pac. 162; Brannigan v. Miller, 35 Cal. App. 292, 169 Pac. 696. See supra, § 42, as to appealability of judgment entered pursuant to mandate of the appellate court.

17. De Wolf v. Bailey, 1 Cal. Unrep. 37.

18. Estate of Wall, 60 Cal. Dec. 140, 191 Pac. 687; Weinstock-Nichols Co. v. Courtney, 26 Cal. App. 445, 147 Pac. 218.

signed is a trivial one in the computation of the amount of the judgment which could have been corrected in the trial court,[19] or where the defendant did not controvert any allegations in the complaint or offer any evidence in support of his defense.[20] Where an appeal has not been prosecuted for two terms, the respondent, on filing a transcript, may ask an affirmance of judgment with damages on the ground that the appeal was taken for delay.[1]

On motion.—An appeal will not, however, be affirmed on motion prior to the regular hearing simply on the ground that it is asserted to be clearly without merit. Such a course is unfair to other litigants entitled to priority.[2]

§ 578. Defects in Proceedings—*Defects leading up to order appealed from.*—Defects in the proceedings leading up to the order denying an application for relief do not authorize a dismissal of an appeal therefrom,[3] but require an affirmance of the order.[4] For example, an order denying a motion for new trial was affirmed where there was a failure to serve a notice of intention to move for a new trial upon an adverse party[5] or at all.[6]

19. Rountree v. I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16 (directing correction of judgment and awarding one hundred dollars damages).

20. Flynn v. Travers, 1 Cal. Unrep. 27.

1. Dillon v. Kelly, 1 Cal. Unrep. 251.

2. Chino Land & W. Co. v. Hamaker, 171 Cal. 689, 154 Pac. 850. See infra, § 578, as to motion to affirm for want of a bill of exceptions.

3. See supra, § 439.

4. Estate of Young, 149 Cal. 173, 85 Pac. 145 (where there was a failure to serve a draft of a bill of exceptions upon motion for new trial); De Mitchell v. Croake, 20 Cal. App. 643, 129 Pac. 946 (where there was no statement).

5. Marshall-Stearns Co. v. Deneen Bldg. Co., 169 Cal. 229, 146 Pac. 685; Johnson v. Phoenix Ins. Co., 152 Cal. 196, 92 Pac. 182; United States v. Crooks, 116 Cal. 43, 47 Pac. 870 (where there was a failure to serve all adverse parties); Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; People ex rel. Love v. Center, 66 Cal. 551, 572, 5 Pac. 263, 6 Pac. 481 (failure to serve all adverse parties).

6. Marshall-Stearns Co. v. Deneen Bldg. Co., 169 Cal. 229, 146 Pac.

Indeed, the order in such case would be affirmed without looking further into the record,[7] as the trial court has no jurisdiction to grant the motion, and the order denying it was properly made.

Defects in proceedings for review.—The lack of a bill of exceptions, though not a ground for a dismissal of an appeal,[8] is rather a ground for a judgment of affirmance, if, as usually the case, there is, in the absence of such bill of exceptions, nothing in the record upon which the action of the superior court can be properly reviewed.[9] The respondent is not authorized to move for an affirmance of the judgment prior to a hearing upon the appeal in its regular order, but upon the hearing of the appeal, a judgment of affirmance will be given if there is no error apparent on the judgment-roll.[10] So, also, the judgment appealed from will be affirmed where the appellant has failed to comply with the rules of court relating to the mode of preparing transcripts, and the transcript filed is unintelligible.[11]

§ 579. Where There are Other Errors or the Complaint is Defective.—Upon an appeal by a plaintiff from a judgment for the defendant on the merits, the appellate court can consider only such errors as are shown to have contributed to its rendition, and not such as might have defeated a contrary judgment. If, for example, a judgment for the defendant is the result of error in excluding evidence which should have been received, he, as respondent upon an appeal, cannot, for the purpose of sustaining

685; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182; S. C., 146 Cal. 571, 80 Pac. 719; Estate of Young, 149 Cal. 173, 85 Pac. 145; Wright v. Snowball, 45 Cal. 654.

7. Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898.

8. See supra, § 440.

9. Randall v. Duff, 105 Cal. 271, 38 Pac. 739; Howell v. Howell, 101 Cal. 115, 35 Pac. 443.

10. Randall v. Duff, 105 Cal. 271, 38 Pac. 739.

11. Douglas v. Fulda, 54 Cal. 588. See supra, § 381.

the judgment, have a consideration of errors against him which are entirely disconnected with the trial, or the judgment as rendered. Objections to a complaint which should be pointed out by special demurrer, cannot, even if specified and overruled, be considered for the purpose of sustaining a judgment for the defendant erroneously rendered after a trial on the merits.[12] Even the objection that the complaint does not state facts sufficient to constitute a cause of action cannot be urged in support of a judgment for the defendant, which appears by the record to be in no way based upon or due to such defect, unless it is made to appear that the complaint is not amendable.[13] To hold otherwise would be manifestly unjust when the defect is one which could have been remedied by an amendment.

§ 580. **Where Reversal Would be Ineffectual.**—An appellate court will not reverse a judgment when for some reason a reversal would be ineffectual,[14] and if it is apparent that in case a new trial should be granted, the

12. Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 16 L. R. A. 745, 30 Pac. 605.

13. Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 Pac. 304 (where a general demurrer was overruled and the judgment on the merits was in no way based upon the insufficiency of the complaint); County Bank of San Luis Obispo v. Jack, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705 (an appeal by a plaintiff from an order denying his motion for a new trial); Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352 (where an order dismissing an action was made under Code Civ. Proc., § 581, subd. 7); South San Bernardino L. & I. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699; Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 16 L. R. A. 745, 30 Pac. 605; Bank of National City v. Johnston, 6 Cal. Unrep. 418, 60 Pac. 776 (opinion in department. For opinion in bank, see 133 Cal. 185, 65 Pac. 383); Nash v. Rosesteel, 7 Cal. App. 504, 94 Pac. 850. This rule is not in conflict with the rule that a defendant does not waive an objection that the complaint does not state facts sufficient to constitute a cause of action by answering and going to trial, but may urge this objection on his appeal from any judgment based thereon by which he is aggrieved. See supra, § 78.

14. Craven v. Central Pac. R. R. Co., 72 Cal. 345, 13 Pac. 878.

verdict of the jury must be the same, the judgment of the court below will not be disturbed.[15]

Where the questions presented by an appeal have become moot, a reversal would prove fruitless, as any opinion given by the appellate court upon the merits of the case would not be followed by any action on the part of the trial court, and would not constitute an adjudication of the rights of the parties. In some jurisdictions, the courts, upon a presentation of the facts, affirm the judgment or order appealed from without a consideration of the merits of the case.[16] This course has been pursued in some California cases,[17] but the practice generally is to dismiss the appeal upon the view that it presents no real controversy, but only a moot or academic question.[18]

§ 581. Affirmance upon Remission of Damages.—When the only error in a judgment is that the amount of the recovery is excessive, and the excess may be segregated, the effect of the error may be absolutely obviated by a remission of such amount, and it is common practice to permit the appellant to file a remittitur or written consent to the reduction of the judgment in the appellate court, and to affirm the judgment as so modified.[19] There is

15. McCreery v. Wells, 94 Cal. 485, 29 Pac. 877; McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; Larco v. Casaneuava, 30 Cal. 560; Tohler v. Folsom, 1 Cal. 207. See infra, § 612.

16. Wright v. Board of Public Works, 163 Cal. 328, 125 Pac. 353.

17. Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683.

18. Wright v. Board of Public Works, 163 Cal. 328, 125 Pac. 353. See supra, § 437.

19. Lightner Min. Co. v. Lane, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771; Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292; State Loan etc. Co. v. Cochran, 130 Cal. 245, 62 Pac. 466; Adams v. Modesto, 131 Cal. 501, 63 Pac. 1083; Eames v. Haver, 111 Cal. 401, 43 Pac. 1120 (where the appellant offered to remit the excess but was taxed with costs because the offer was not made before new trial ordered); Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766; Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302; Muller v. Boggs, 25 Cal. 175, 187 (where one tenant in common suing a stranger for possession of the entire premises recovers a judgment for all the rents and profits, though

no question as to the power of the appellate court in a proper case to allow the respondent to remit damages and upon such remission to affirm the judgment.[20] Substantial justice demands that instead of reversing the cause for a new trial, the appellant be at least given an opportunity to accept the part of the damages as to which there is no error.[1]

Where damages are unliquidated.—Although elsewhere there is authority to the contrary, the rule seems to be settled in California that a remission of damages may be directed even in cases where there is no precise measure of damages, as in actions for damages for personal injury, for example. If in such case, the jury appears to have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict, the appellate court may order that judgment be reversed unless the plaintiff files a stipulation remitting the excess.[2] If there have been two trials, and the jury in the second with improper evidence before it renders a verdict greater than the first verdict based upon proper

he is entitled to a part, a remission of damages may be ordered); Doll v. Feller, 16 Cal. 432; Pierce v. Payne, 14 Cal. 419 (where judgment for damages is for more than the amount claimed in the complaint, the excess may be remitted and the judgment will stand); Curran v. Hubbard, 14 Cal. App. 733, 114 Pac. 81, 83; Clapp v. Vatcher, 9 Cal. App. 462, 99 Pac. 549; Craig v. Dowie, 4 Cal. App. 176, 87 Pac. 250. See NEW TRIAL as to power of trial court to order a remission of damages.

20. Simoneau v. Pacific Electric Ry. Co., 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544.

1. Lightner Min. Co. v. Lane, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093.

2. Simoneau v. Pacific Electric Ry. Co., 166 Cal. 265, 49 L. R. A. (N. S.) 737, 136 Pac. 544; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320; Phelps v. Cogswell, 70 Cal. 201, 11 Pac. 628 (where the trial court directed a remission and the appellate court directed a greater remission); Kinsey v. Wallace, 36 Cal. 462 (action for damages for malicious prosecution); Tarbell v. Central Pacific Ry. Co., 34 Cal. 616 (action for damages for ejection of passenger by carrier); De Costa v. Massachusetts F. W. & M. Co., 17 Cal. 613 (action for damages resulting from nuisance). See supra, § 541, as to power of appellate court over the question of damages. See DAMAGES.

evidence as to damages, the plaintiff will be directed to remit the difference, as it must be presumed that the jury on the first trial made a fair and conscientious award, and with that as a basis for consideration, it is reasonable to suppose that the improper evidence prejudiced the appellant to the extent of the difference between the two verdicts.[3]

III. MODIFICATION.

§ 582. Authority to Modify.—It has never been the rule in California that on appeal from a judgment as an entirety, the power of the court is limited to an affirmance or reversal of the judgment as a whole. On the contrary, it has been the uniform practice to modify the judgment, when a modification is appropriate and necessary to a correct determination of the rights of the parties. When a party appeals from a judgment as a whole, he seeks not only a reversal, but also any proper modification of the judgment.[4] The appellate court does not reverse a judgment or direct a new trial, if it is able from the record to determine the rights of the parties, but it will itself make a final determination of the rights of the parties by a correction or modification of the judgment.[5] Under its authority to modify the judgment or order appealed from, the appellate court will render its own judgment to that effect, or will direct such action in the court below as in its opinion will best conserve the rights of the parties to the action, without subjecting them to further delay or expense.[6] This rule is followed whether the error

3. Simoneau v. Pacific Electric Ry. Co., 166 Cal. 265, 49 L. R. A. (N. S.) 737, 136 Pac. 544.

4. Williams v. Santa Clara Mining Assn., 66 Cal. 193, 5 Pac. 85.

5. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731 (per Harrison, J.); Union Water Co. v. Murphy's Flat Flume Co., 22 Cal. 621 (holding that a judgment will not be reversed as to a defect which the appellate court can correct by modification); Burke v. Norton, 29 Cal. App. 585, 184 Pac. 45.

6. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731

is found upon an examination of the record,[7] or appears on the face of the judgment,[8] or is confessed by the respondent,[9] or when the respondent asks for or consents to a modification.[10] In such a case, the court may render such a judgment as the trial court should have rendered,[11] or direct the trial court to enter such judgment.[12] A modification, however, cannot be made or directed where in order to do so the appellate court must make a finding different from that made by the trial court, or where none was made by the lower court.[13] And, of course, a judgment or order from which no appeal has been taken cannot be modified upon an appeal from some other judgment or order.[14]

§ 583. When Court may Modify Judgment.—By way of illustrating the power of an appellate court to modify a judgment, it has been held that it may modify where the judgment is broader than the issues,[15] or is one which

(per Harrison, J.). See infra, § 587, as to directing judgment in trial court.

7. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731; Woods v. Merrill, 57 Cal. 435 (where through some mistake a credit was not allowed the defendant); Coghill v. Boring, 15 Cal. 213 (where error appeared from agreed case). See infra, § 584.

8. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731.

9. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731; Atherton v. Fowler, 46 Cal. 320.

10. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731. See infra, § 584.

11. Bidleman v. Kewen, 2 Cal. 248; Gahan v. Neville, 2 Cal. 81.

12. See infra, § 587.

13. Posachane W. Co. v. Standart, 97 Cal. 476, 32 Pac. 532; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Merrill v. Hurlburt, 63 Cal. 494; Piper v. Kellerman, 32 Cal. App. 128, 162 Pac. 423; O'Reilly v. All Persons, 29 Cal. App. 49, 154 Pac. 474. Compare McConnell v. Corona City Water Co., 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929, where the court ordered a modification as to amount upon the undisputed evidence of the respondent.

14. Bryan v. Bryan, 7 Cal. Unrep. 19, 70 Pac. 304 (on an appeal from an order on motion for new trial the appellate court cannot modify the judgment); Harbaugh v. Lassen Irr. Co., 31 Cal. App. 764, 161 Pac. 755 (appeal from an order quashing an execution); John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 Pac. 690, 122 Pac. 835.

15. Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715;

does not conform to the verdict or finding,[16] or to the pleadings,[17] or which contains clerical errors.[18] It may correct a judgment which is erroneous in that it is rendered against strangers to the action,[19] or parties who have been dismissed therefrom.[20] So, also, it may correct a decree directing a sale on foreclosure of a mortgage which is proper in all respects except that it makes no provision as to the surplus of the proceeds.[1] And a judgment against an executor or administrator absolutely may be modified so as to make it payable in due course of administration.[2] A modification may be directed also when a severable part of a verdict or finding is, as a matter of law, unsupported by the evidence.[3]

Hellings v. Duvall, 131 Cal. 618, 63 Pac. 1017.

16. Ryan v. Fitzgerald, 87 Cal. 345, 25 Pac. 546 (where a verdict in replevin found the plaintiff was entitled to a part of the property sued for and is silent as to the remainder, and where the defendant has asked for a return of the property, it must be held that the plaintiff is not entitled to the balance, and a judgment which does not so provide will be modified so as to require a return of the balance); Clark v. Huber, 20 Cal. 196 (when there is a discrepancy between the findings of fact and the judgment, the appellate court may order the proper modification of the judgment); Machado v. Machado, 26 Cal. App. 16, 145 Pac. 738 (an appellate court may modify the judgment when the trial court has been mistaken as to the law applicable to the facts found).

17. See infra, § 584.

18. Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Herman v. Paris, 81 Cal. 625, 22 Pac. 971 (clerical error as to amount of costs); Anderson v. Parker, 6 Cal. 197 (clerical error in awarding the whole of a tract of land instead of only the one-half sued for).

19. Throop v. Weaver, 180 Cal. 335, 181 Pac. 55.

20. Browner v. Davis, 15 Cal. 9.

1. Union Water Co. v. Murphy's F. F. Co., 22 Cal. 621.

2. Vance v. Smith, 124 Cal. 219, 56 Pac. 1031; Preston v. Knapp, 85 Cal. 559, 24 Pac. 811; Drake v. Foster, 52 Cal. 225; Davis v. Lamb, 5 Cal. Unrep. 765, 35 Pac. 306; Dyer v. Minturn, 31 Cal. App. Dec. 977, 189 Pac. 1046; Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. App. 643, 166 Pac. 371. See Hendry v. Irvine, 9 Cal. App. 376, 99 Pac. 408 (not directing modification under the circumstances of the case).

3. Williston v. Perkins, 51 Cal. 554 (ordering a provision as to payment of a judgment in gold coin be stricken out where there was no evidence to sustain the finding as to that matter); Moody v. McDonald, 4 Cal. 297 (where the jury rendered a verdict for smart-money

A modification will not be made, however, where it would not benefit the appellant;[4] and it is not necessary to order a modification of a judgment by striking therefrom words which are mere surplusage.[5]

§ 584. Modification as to Amount of Recovery.—Where the judgment appealed from is correct in all respects except as to the amount, and the record furnishes the data for correcting the error, the appellate court may modify the judgment and allow it to stand as modified.[6] A judg-

which was clearly ascertainable and the judgment was modified by reducing the judgment).

4. George v. Silva, 68 Cal. 272, 9 Pac. 257 (where a judgment for costs was made payable to one plaintiff instead of the other, a modification of the judgment will not benefit the defendant and will not be made).

5. Hentig v. Johnson, 8 Cal. App. 221, 96 Pac. 390.

6. Supreme Lodge v. Los Angeles Lodge, 177 Cal. 132, 169 Pac. 1040; De Kahn v. Chase, 177 Cal. 281, 170 Pac. 608 (modifying judgment by striking therefrom an erroneous direction as to payment of taxes and insurance); Edwards v. Arp, 173 Cal. 472, 160 Pac. 551 (improper allowance of interest); McConnell v. Corona City Water Co., 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786 (clerical error as to amount); Kern Valley Bank v. Chester, 55 Cal. 49; Atherton v. Fowler, 46 Cal. 320; Foucault v. Pinet, 43 Cal. 136; Bryson v. McCone, 6 Cal. Unrep. 35, 53 Pac. 639 (holding under the circumstances the court was not inclined to go beyond strict rules of law to increase the allowance of damages); People v. Hoag, 1 Cal. Unrep. 326; Los Angeles Furniture Co. v. Hansen, 31 Cal. App. Dec. 391, 188 Pac. 292; Schnierow v. Boutagy, 33 Cal. App. 336, 164 Pac. 1132; De Liere v. Goldberg, Bowen & Co., 30 Cal. App. 612, 159 Pac. 197; Hill v. Nerle, 29 Cal. App. 473, 156 Pac. 981; Machado v. Machado, 26 Cal. App. 16, 145 Pac. 738; Callan v. Empire State Surety Co., 20 Cal. App. 483, 129 Pac. 978, 981; American-Hawaiian E. & C. Co. v. Butler, 17 Cal. App. 764, 121 Pac. 709 (increasing amount of judgment); Frisbie v. Rosenberg Bros. & Co., 11 Cal. App. 638, 105 Pac. 943; Sherman v. Gray, 11 Cal. App. 348, 104 Pac. 1004; Klokke v. Raphael, 8 Cal. App. 1, 96 Pac. 392; White v. Gaffney, 1 Cal. App. 715, 82 Pac. 1088 (modification as to costs). See Perkins v. West Coast Lumber Co., 4 Cal. Unrep. 155, 33 Pac. 1118 (remanding cause for new trial that the defendant might be given leave to amend his pleadings).

An error in rendering judgment upon a cause of action which is insufficient may be corrected by a modification of the judgment in this respect where the verdict is such that the amount is ascertainable. Castle v. Smith, 4 Cal. Unrep. 561, 36 Pac. 859.

ment may be modified, for example, when it is erroneous in awarding more damages than is claimed in the pleading of the prevailing party,[7] or when it exceeds the amount of the principal and interest of the note sued on at the time of its rendition.[8] Such modification cannot be made, however, when the excess is not ascertainable,[9] or when it would be necessary for the appellate court to make a finding from the evidence.[10] And the modification is sometimes conditioned upon the consent of the respondent.[11]

Consent by respondent to reduction.—When upon an appeal from a judgment the respondent releases the appellant from that portion of the damages claimed in the action which is involved in the appeal, and withdraws from consideration by the court his right to judgment for such damages, it is proper to direct the court below to modify the judgment in accordance with such withdrawal.[12] His motion for a modification should be granted whether he makes it for the reason that he is convinced that he can-

7. Ackerman v. Schultz, 178 Cal. 190, 172 Pac. 609; Supreme Lodge v. Los Angeles Lodge, 177 Cal. 132, 169 Pac. 1040; Kerry v. Pacific Marine Co., 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89; Patterson v. Sharp, 41 Cal. 133; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211 (judgment modified on respondent's filing of his consent thereto); Dake Advertising Co. v. Fielding J. Stilson Co., 22 Cal. App. 31, 133 Pac. 327 (a default judgment in excess of the amount sued for will be corrected by the appellate court).

8. Davis v. Lamb, 5 Cal. Unrep. 765, 35 Pac. 306.

9. King v. Southern Pacific Co., 109 Cal. 96, 29 L. R. A. 755, 41 Pac. 786.

10. Bayless v. Reed, 31 Cal. App. Dec. 1079, 190 Pac. 211.

11. Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Clapp v. Vatcher, 9 Cal. App. 462, 99 Pac. 549.

12. Campbell v. Canty, 162 Cal. 382, 123 Pac. 266 (where the error as to amount was too small to justify a new trial); Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac. 488; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772; Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902; Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731 (per Harrison, J.); Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169; Carpentier v. Gardiner, 29 Cal. 160; Muller v. Boggs, 25 Cal. 175; Conlin v. Emanuel Lewis Inv. Co., 26 Cal. App. 388, 147 Pac. 472. See supra, § 581.

not prevail in the action, or because he prefers to remit such damages rather than submit to the delay consequent upon a new trial.[13]

IV. REVERSAL.

§ 585. In General.—The distinction between a reversal of a judgment and an affirmance with a modification is too marked and radical to be disregarded. An order that a judgment be reversed and the cause remanded with directions to enter a judgment in accord with the opinion of the appellate court is a reversal, and the part directing the entry of a new judgment relates solely to proceedings after the reversal. The fact that the same result can be reached by a modification does not affect the character of the order in question.[14] So, also, when an appellate court renders the judgment, instead of directing the trial court to modify its judgment, the judgment is reversed, for otherwise there would be two judgments for the same cause of action.[15]

§ 586. Partial Reversal.—A judgment may be reversed in part and affirmed in part when the erroneous portion can be segregated from the remainder, as where the error has affected but one or more of a greater number of distinct and several issues or causes of action.[16] So, also, a judgment may be reversed as to one of several coparties.[17] It was the common-law rule that the reversal of a joint judgment against several joint tort-feasors for error

13. Fox v. Hale & Norcross Silver Min. Co., 122 Cal. 219, 54 Pac. 731.

14. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196. See supra, § 570, as to extent of reversal.

15. Argenti v. San Francisco, 30 Cal. 458.

16. Gray v. Cotton, 166 Cal. 130, 134 Pac. 1145; Haller v. Yolo Water & Power Co., 34 Cal. App. 317, 167 Pac. 197; Raleigh v. Lee, 26 Cal. App. 229, 146 Pac. 696. See supra, § 582, as to modification, and infra, § 589, as to new trial of a single issue.

17. Wittenbrock v. Bellmer, 57 Cal. 12; Bank of Stockton v. Howland, 42 Cal. 129.

against one defendant necessitated a reversal of the judgment as to all of the defendants. This rule has been materially modified, if not entirely superseded, by statute in this state, and now it is the rule that if a verdict be given against several defendants who have been sued jointly, the verdict and judgment, if found to be erroneous as to any one of the defendants, may be reversed as to him, and continued in full force and effect as to the remaining defendants.[18] When one of several coparties appeals from a judgment against all, the judgment may be reversed as to the appellant and left undisturbed as to his coparties who do not appeal.[19]

§ 587. Rendering or Ordering Final Judgment.—While the code confers upon the appellate courts power to "direct the proper judgment or order to be entered,"[20] it is not the practice to direct the entry of judgment in the court below in actions at law, except where the facts have been found by the judge who tried the cause, or by the special verdict of a jury, or where, from the character of the action or pleadings, one of the parties is entitled to judgment without proof.[1] The court cannot direct the entry of judgment when there are controverted facts to be decided.[2] But, unless the circumstances require the cause to be remanded for further proceedings, an appellate court may order a judgment for the defendant when the plaintiff in his complaint has admitted facts precluding a recovery.[3] So, also, it may render judgment for the

18. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513; Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 Pac. 178; Nichols v. Dunphy, 58 Cal. 605; Clark v. Torchiana, 19 Cal. App. 786, 127 Pac. 831.

19. Nichols v. Dunphy, 58 Cal. 605; Minturn v. Baylis, 33 Cal. 129; Ricketson v. Richardson, 26 Cal. 149. See supra, § 570.

20. Code Civ. Proc., § 53; Schroeder v. Schweizer Lloyd Transport etc. Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61; Argenti v. San Francisco, 30 Cal. 458.

1. Bagley v. Eaton, 10 Cal. 126.

2. Lick v. Diaz, 37 Cal. 437.

3. Mulford v. Estudillo, 32 Cal. 131.

party entitled thereto when the facts appear in an agreed statement and show that one of the parties is entitled to judgment,[4] or when the findings are undisputed and support a judgment for the appellant, and it is improbable that a new trial would result more favorably for the respondent.[5] In the latter case the appellate court does not determine questions of fact. It merely takes the findings as made by the trial court, and determines a question of law as to what is the proper judgment to be rendered on such findings.[6] Extreme caution should be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is plain either from

4. Perkins v. Cowles, 157 Cal. 625, 137 Am. St. Rep. 158, 30 L. R. A. (N. S.) 283, 108 Pac. 711; City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439; Ions v. Harbison, 112 Cal. 260, 44 Pac. 572; Brown v. Houser, 1 Cal. Unrep. 578 (holding judgment will not be directed where a considerable portion of the statement was not definitely admitted, but only to be considered by the trial court if it should judge testimony thereon admissible and where it could not be determined how the court considered such part); Brunette v. Wolf, 1 Cal. Unrep. 103.

5. Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360; Alden v. Mayfield, 164 Cal. 6, 127 Pac. 45; Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 Pac. 82 (refusing to direct judgment as it was probable the actual facts warranted the decree rendered); Rahmel v. Lehndorff, 142 Cal. 681, 100 Am. St. Rep. 154, 65 L. R. A. 88, 76 Pac. 659; Shively v. Eureka Tellurium G. Min. Co., 129 Cal. 293, 61 Pac. 939 (holding in this case the findings were insufficient); Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858 (ordering judgment for the defendant as the case appeared to have been thoroughly tried as to the facts and it appeared very improbable that a new trial would result more favorably to the plaintiff); Oakland Pav. Co. v. Bagge, 79 Cal. 439, 21 Pac. 855; Dyer v. Chase, 57 Cal. 284; Love v. Shartzer, 31 Cal. 487; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; McCord v. Martin, 32 Cal. App. Dec. 404, 191 Pac. 89; Yost v. Roux, 27 Cal. App. 307, 149 Pac. 781; Reeder v. Wells, Fargo & Co., 14 Cal. App. 790, 113 Pac. 342 (where there was a failure to find as to an issue, but it was presumed that no evidence was introduced, and therefore judgment was directed); Carter v. Fox, 11 Cal. App. 67, 103 Pac. 910; Eichelberger v. Mills Land & W. Co., 9 Cal. App. 628, 100 Pac. 117 (holding judgment for the plaintiff could not be awarded, as the court had failed to find upon a material issue).

6. Dyer v. Brogan, 57 Cal. 234.

the pleadings or from the nature of the controversy that the party against whom the reversal is pronounced, cannot prevail in the suit.[7] Unless the appellate court can satisfy itself from the record as to the ultimate rights of the parties, it will not undertake in reversing a judgment to finally settle the same.[8] It is obvious that the trial court cannot be directed to enter judgment on the findings, where the findings have been set aside as unsupported by the evidence.[9] Neither will the court order judgment for the appellant upon the findings when it may be that a different case would be made out on a new trial,[10] or when the evidence is not in the record and it is doubtful whether the trial court gave its finding the same construction the appellate court does,[11] or where it appears that the trial court acted inadvertently in the adoption of the findings and determination of the proper judgment to be given thereon,[12] or where the respondent asserts that he objected to certain findings and would have impeached them by bill of exceptions bringing up the evidence had the judgment been against him,[13] or generally where to do so would cause grave injustice.[14] On reversing a judgment for the defendant on a nonsuit, a judgment for the plaintiff will not be awarded although the answer presents no defense. The reason is that, in the absence of a trial below, it cannot be known what

7. Oakland Paving Co. v. Bagge, 79 Cal. 439, 21 Pac. 855; Schroeder v. Schweizer Lloyd Transport V. Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61, quoting Griffin v. Marquadt, 17 N. Y. 28.

8. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911.

9. Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849. See infra, § 588.

10. Cooper v. Shepardson, 51 Cal. 298; Thomasson v. Wood, 42 Cal. 416 (where a defendant may not have presented all his defenses because of his reliance upon a case since overruled).

11. Merrill v. First Nat. Bank, 94 Cal. 59, 29 Pac. 242.

12. Machado v. Machado, 26 Cal. App. 16, 145 Pac. 738.

13. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Schroeder v. Schweizer Lloyd Transport V. Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61.

14. Alden v. Mayfield, 164 Cal. 6, 127 Pac. 45, where the findings were held unsupported on another appeal.

course would have been taken by amendment or otherwise by way of defense.[15] And judgment will not be ordered upon special findings inconsistent with a general verdict where the appellant failed to move for judgment in his favor on the special findings.[16]

Upon the reversal of an order refusing to vacate a former order, the practice generally is not directly to vacate the former order, but to remand the cause with directions to the court below to set it aside.[17]

§ 588. Directing Judgment When Necessary to Make Findings.—Since an appellate court has no power to make findings, it cannot modify a judgment or direct the entry of a different judgment, where such judgment would not be supported by the findings and would in effect require that new findings be made by the appellate court.[18] It cannot, therefore, direct what judgment should be entered where it reverses the judgment because the testimony is insufficient to sustain a finding on any material point. In such a case there must be a new trial.[19] For the same reason, an appellate court has no authority to order judgment in accordance with testimony erroneously excluded

15. McMillan v. Dana, 18 Cal. 339. See infra, § 588, as to allowance of amendments.

16. Napa Valley Packing Co. v. San Francisco Relief and Red Cross Funds, 16 Cal. App. 461, 118 Pac. 469 (the court will only reverse).

17. Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009.

18. Bank of British Columbia v. Frese, 116 Cal. 9, 47 Pac. 783; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249, 681; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Rush v. Casey, 39 Cal. 339; Hyman v. Karl Stern Co., 32 Cal. App. Dec. 314, 191 Pac. 47; Guy v. Leech, 32 Cal. App. Dec. 361, 190 Pac. 1067; Union Inv. Co. v. F. M. Landon Co., 32 Cal. App. 305, 162 Pac. 903. See supra, § 540, as to power of appellate court to make findings.

19. Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Ede v. Knight, 93 Cal. 159, 28 Pac. 860; Chandler v. People's Savings Bank, 65 Cal. 498, 4 Pac. 502; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Clark v. Huber, 20 Cal. 196; Hyman v. Karl Stern Co., 32 Cal. App. Dec. 314, 191 Pac. 47; Cohen v. Anderson, 22 Cal. App. 634, 135 Pac. 1096; C. Ganahl Lumber Co. v. Weinsveig, 16 Cal. App. 687, 117 Pac. 954; McMahon v. Hetch Hetchy & Y. V. Ry. Co., 2 Cal. App. 400, 84 Pac. 350.

by a trial court;[20] and it will not direct final judgment upon the evidence.[1]

§ 589. Ordering New Trial and Other Proceedings.—It is undoubted that the appellate court has power to order a new trial as the power to do so is expressly conferred by the code.[2] The granting of a new trial upon the reversal of a judgment is within the discretion of the appellate court. And it may either direct the cause to be tried de novo, or that a particular issue be tried, leaving all the facts found by the court remaining as facts in the case;[3] or it may direct the trial court to find upon an issue either upon evidence before it or such further evidence as may be introduced.[4] The appellate court cannot direct the entry of judgment, but must award a new trial where the verdict or findings are unsupported by the evidence,[5] or where they are the result of evidence erroneously admitted or excluded,[6] or where there is a failure to find upon material issues upon which evidence has been

20. Dyer v. Brogan, 57 Cal. 234.

1. Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Poorman v. D. O. Mills & Co., 43 Cal. 323.

2. Code Civ. Proc., § 53; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Schroeder v. Schweizer Lloyd Transport V. Gesellschaft, 60 Cal. 467, 44 Am. Rep. 61.

3. Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; Robinson v. Muir, 151 Cal. 118, 90 Pac. 521 (the rule is equally applicable to appeals from judgments and from orders denying new trial); Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200; Duff v. Duff, 101 Cal. 1, 35 Pac. 437; San Diego Land & T. Co. v. Neale, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372; Argenti v. San Francisco, 30 Cal. 458; Rossi v. Caire, 39 Cal. App. 776, 180 Pac. 58; Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362.

When the court has erred in its judgment upon a single issue not of sufficient importance to warrant a new trial of the whole case, a new trial will be limited to that issue alone. Mayberry v. Whittier, 144 Cal. 322, 78 Pac. 16.

4. Goodlett v. St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505; Tunis v. Lakeport A. Park Assn., 98 Cal. 285, 33 Pac. 63, 447; Strecker v. Gaul, 35 Cal. App. 619, 170 Pac. 646 (direction to find upon evidence in the record); O'Reilly v. All Persons, 29 Cal. App. 49, 154 Pac. 474; Elizalde v. Murphy, 11 Cal. App. 32, 103 Pac. 904.

5. See supra, § 588.

6. Sun Ins. Co. v. White, 118 Cal. 468, 50 Pac. 546.

introduced,[7] or where the findings would not support a judgment for the appellant if such a judgment were ordered,[8] or where there is prejudicial error as to the instructions,[9] as well as in other cases. The usual practice, on a reversal of an order denying a new trial, is to vacate the order, grant the new trial, and remand the cause for a retrial.[10]

Other proceedings.—When a judgment is reversed, an appellate court may remand the cause for the purpose of allowing the appellant to amend his pleadings, if such a course seems to be required in the interests of justice.[11] Accordingly, where a defendant sued by a fictitious name appears and answers, but the complaint is not amended by substituting his true name, the judgment will not be reversed, but the court below will be directed to amend the complaint as of a date prior to the judgment, in order to support the judgment.[12] But when upon an appeal from a judgment upon a demurrer to the complaint, it appears that the complaint is wholly insufficient, the court

7. McMahon v. Hetch Hetchy & Y. V. Ry. Co., 2 Cal. App. 400, 84 Pac. 350. See infra, § 614.

8. Fidelity etc. Co. v. Fresno Flume etc. Co., 161 Cal. 466, 37 L. R. A. (N. S.) 322, 119 Pac. 646. See supra, § 588.

9. Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663 (refusal of instruction).

10. Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009.

11. Gamache v. South School District, 133 Cal. 145, 65 Pac. 301; Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680; Mullally v. Townsend, 119 Cal. 47, 50 Pac. 1066 (on reversing a nonsuit, the court will allow the defendant to amend his pleadings); Thomasson v. Wood, 42 Cal. 416; Fish v. Redington, 31 Cal. 185 (upon terms). But when a demurrer to a complaint is properly sustained with leave to amend, and the plaintiff declines to do so, the judgment on demurrer will not be reversed merely in order to allow an amendment. Sutter v. San Francisco, 36 Cal. 112; Gibbons v. Scott, 15 Cal. 284. See infra, § 626.

12. Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766; Baldwin v. Bornheimer, 48 Cal. 433; Blackburn v. Bucksport & E. R. R. R. Co., 7 Cal. App. 649, 95 Pac. 668 (whether or not such amendment is necessary where the defendant files a cross-complaint, it is probably better practice to direct the complaint to be amended). See McKinlay v. Tuttle, 42 Cal. 570 (reversing judgment).

cannot remand the cause for the purpose of amendment but must affirm the judgment.[13]

A reversal may practically end the controversy. When such is the case, it is usually accompanied with an order dismissing the action.[14] And where a reversal is placed upon the ground that the trial court was without jurisdiction, that court will be directed to dismiss the action.[15] It has been held that inasmuch as the imposition of terms as a condition to relief from default is a matter resting primarily in the discretion of the trial court, the appellate court will not include in its judgment reversing the action of the court below a direction as to terms.[16] On appeal from an erroneous order refusing a motion to call in a different judge to preside at the hearing of a motion for new trial, the proper order is one pronouncing the order of the lower court void. The effect of such an order would be to vacate it and send it back for hearing before a qualified judge.[17]

§ 590. Effect of Reversal.—To reverse is to overthrow, set aside, make void, annul, repeal, revoke or vacate.[18] When a judgment or order is reversed, it is entirely vacated, and is without vitality or force.[19] The proceeding is left where it stood before the judgment or order was made,[20] and the parties stand in the same position as if

13. Mulford v. Cohn, 18 Cal. 42.

14. Argenti v. San Francisco, 30 Cal. 458.

15. McConoughey v. City of San Diego, 128 Cal. 366, 60 Pac. 925.

16. Vermont Marble Co. v. Black, 4 Cal. Unrep. 901, 38 Pac. 512. (See as part of the history of this case, the later appeal, 123 Cal. 22, 55 Pac. 599).

17. Mercantile Trust Co. v. Sunset Road Oil Co., 173 Cal. 487, 160 Pac. 545.

18. Whalen v. Smith, 163 Cal. 360, Ann. Cas. 1913E, 1319, 125 Pac. 904 (per Henshaw, J., dissenting); Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Sharon v. Sharon, 84 Cal. 424, 23 Pac. 1100; Laam v. McLaren, 28 Cal. App. 632, 153 Pac. 985 (reversal of an order granting a temporary injunction).

19. Estate of Pusey, 177 Cal. 367, 170 Pac. 846; In re Estate of Mitchell, 126 Cal. 248, 58 Pac. 549.

20. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326;

no such judgment or order had ever been rendered or made.[1] They have the same rights which they originally had.[2] When the appellate court reverses a judgment and its mandate is filed in the lower court, the judgment is reversed whether the lower court afterwards makes any order conforming its judgment to that of the appellate court or not.[3]

The reversal of a judgment or decree causes other proceedings dependent upon it to fall.[4] An order made after judgment in execution of its terms ought to fall with the judgment and is substantially reversed by the reversal of the judgment.[5] And it has been held that a reversal sets aside a sale of the defendant's property to the plaintiff in satisfaction of the judgment.[6]

If the order reversed is an order vacating a previous order, the effect of the reversal is to restore the previous order to full force and effect.[7] A reversal of an order settling an account of an executor necessarily vacates a decree of distribution made at the same time.[8]

Carpy v. Dowdell, 131 Cal. 495, 63 Pac. 778; In re Estate of Mitchell, 126 Cal. 248, 58 Pac. 549.

1. Estate of Pusey, 177 Cal. 367, 170 Pac. 846; Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Carpy v. Dowdell, 131 Cal. 495, 63 Pac. 778; Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Raun v. Reynolds, 18 Cal. 275; People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029.

2. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Argenti v. San Francisco, 30 Cal. 458; Phelan v. San Francisco Supervisors, 9 Cal. 15; Stearns v. Aguirre, 7 Cal. 443; Rossi v. Caire, 39 Cal. App. 776, 180 Pac. 58.

3. Reynolds v. Hosmer, 45 Cal. 616.

4. Turner v. Markham, 156 Cal. 68, 103 Pac. 319 (holding that proceedings supplementary to execution must fall with the judgment, and should be set aside by the superior court, even if the order therein had been affirmed prior to the reversal of the main judgment); McGarrahan v. Maxwell, 28 Cal. 75 (holding that an injunction falls with the judgment on which it was based).

5. Hidden v. Jorden, 1 Cal. Unrep. 216.

6. Di Nola v. Allison, 143 Cal. 106, 65 L. R. A. 419, 76 Pac. 976. See infra, §§ 592, 631 et seq., as to restriction upon reversal.

7. In re Estate of Mitchell, 126 Cal. 248, 58 Pac. 549.

8. Estate of Delaney, 110 Cal. 563, 42 Pac. 981.

On appeal from part of judgment.—Since an appeal from a distinct and independent part of a judgment does not bring up the other parts of the judgment for review in the appellate court,[9] a reversal of the part appealed from does not, as a general rule, affect the portions of the decree not dependent thereon, and they will stand as a final adjudication.[10] There are, however, cases of appeals from a part of a judgment where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part of it affects the other parts or involves a consideration of the whole, and is really an appeal from the judgment, and where if a reversal is ordered, it should extend to the entire judgment. In such cases, the appellate court must have power to do what justice requires and may extend its reversal as far as may be deemed necessary to accomplish that end.[11]

When court has no jurisdiction.—Where the court is without jurisdiction of an appeal, a reversal is unauthorized and leaves the judgment or order in full force and effect as if no appeal had been attempted.[12]

Reversal of judgment of appellate court.—When the supreme court of the United States reverses a judgment of affirmance rendered by the supreme court of this state, such reversal does not immediately reverse the judgment of the superior court. But upon the coming down of the

9. See supra, § 475.

10. G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 Pac. 1025; Whalen v. Smith, 163 Cal. 360, Ann. Cas. 1913E, 1319, 125 Pac. 904.

11. G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 Pac. 1025; Whalen v. Smith, 163 Cal. 360, Ann. Cas. 1913E, 1319, 125 Pac. 904 (per Shaw, J.). Where, in an action to recover a bank deposit to which there are conflicting claims, a judgment is rendered in favor of the defendant claimant against the bank, the court, on an appeal by the plaintiff, has power to reverse the whole judgment including the portion against the bank, if it concludes that the plaintiff should prevail. Halsted v. First Savings Bank, 173 Cal. 605, 160 Pac. 1075.

12. Estate of Devincenzi, 131 Cal. 452, 63 Pac. 723.

remittitur, the appeal is still pending for such further disposition as is not inconsistent with the opinion filed by the federal supreme court.[13]

§ 591. Effect of Reversal of Order on Motion for New Trial.—Although an appeal from an order denying a motion for a new trial was in a different and distinct line of proceeding from a direct appeal from a judgment, still a reversal on appeal from the order denying a motion for a new trial, and remanding the cause for retrial, as effectually vacated the judgment as did a reversal of the judgment upon a direct appeal therefrom.[14] It placed the parties in the same position as if the cause had never been tried,[15] with the exception that the opinion of the appellate court was followed so far as practicable in the new trial.[16]

The reversal of an order granting a new trial leaves a verdict standing as it came from the jury; and if judgment has not been rendered, the parties are entitled to have it rendered and entered.[17] If judgment was entered, it stands as the judgment in the action and has effect from the date of its original entry. This is true because the effect of the order is suspended by the appeal therefrom, and rendered ineffectual until the determina-

13. Harding v. Harding, 148 Cal. 397, 83 Pac. 434.

14. Bell v. Staacke, 151 Cal. 544, 91 Pac. 322 (the judgment is vacated by an order granting a new trial, although expressly affirmed); Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 Pac. 178; Laidlow v. Pacific Bank, 137 Cal. 392, 70 Pac. 277; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620 (explaining Holland v. McDade, 125 Cal. 353, 58 Pac. 9); Westall v. Altschul, 126 Cal. 164, 58 Pac. 458 (it vacates the judgment and leaves the case standing for trial); Estate of Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192; Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205; People v. Burns, 78 Cal. 645, 21 Pac. 540; Fulton v. Hanna, 40 Cal. 278; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135.

15. Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065. See infra, § 628.

16. Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065. See infra, § 620.

17. Eades v. Trowbridge, 143 Cal. 25, 76 Pac. 714, holding an order setting aside a verdict to be in effect an order granting a new trial.

tion of the appeal either by a dismissal thereof or by an affirmation of the order.[18]

§ 592. Restitution.—Where a judgment or decree of an inferior court is reversed on appeal, the party appellant is in general entitled to restitution of all the things lost by reason of the judgment in the lower court. Accordingly, where justice requires it, the courts will place him as nearly as may be in the condition in which he stood previously.[19] The restitution may be directed and provided for in the original action itself,[20] or it may be sought in a separate action instituted for that purpose.[1] This is recognized by the code, which provides as follows:

"When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale."[2]

18. Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 Pac. 92; Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205.

19. Asato v. Emirzian, 177 Cal. 493, 171 Pac. 90; Turner v. Markham, 156 Cal. 68, 103 Pac. 319; Ward v. Sherman, 155 Cal. 287, 100 Pac. 864; Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776; Kenney v. Parks, 120 Cal. 22, 52 Pac. 40; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050. See infra, §§ 631, 632, as to restitution in lower court.

20. Ward v. Sherman, 155 Cal. 287, 100 Pac. 864. See Reynolds v. Reynolds, 2 Cal. Unrep. 547, 8 Pac. 184, where Thornton, J., specially concurring, says the motion for restitution must be against a party to the action and not against the attorney of a party.

1. See infra, § 632.

2. Code Civ. Proc., § 957 (in part); Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69; Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176.

This provision has been a part of the rule of procedure in this state since June, 1853.[3] It is not mandatory upon the court, but the power to make restitution rests in its discretion.[4] It was held in an early case, that this provision applies only where the judgment operates upon specific property in such a manner that its title is not changed,—as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like.[5] It does not, therefore, authorize restitution when the property of the defendant is sold to bona fide purchasers,[6] nor does the rule apply to property lost, not in consequence of the judgment appealed from, but under an order prior thereto from which no appeal was taken.[7]

V. RENDITION, ENTRY AND MODIFICATION OF JUDGMENT.

§ 593. In General.—A judgment on appeal, like a judgment of a trial court, has the force and effect of a judgment from the time of its entry. The fact that within a limited time thereafter a rehearing may be ordered, while it may suspend the operation of the judgment, does not in the meantime deprive the judgment of its inherent attributes as an act of the court.[8]

Modification or vacation of judgment.—An appellate court has inherent power to revise, modify and correct a judgment rendered by it while it has jurisdiction and control of the cause.[9] A judgment of the supreme court

3. Stats. 1853, p. 289.

4. Yndart v. Den, 125 Cal. 85, 57 Pac. 761; Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 Pac. 218.

5. Farmer v. Rogers, 10 Cal. 335, quoted in Hewitt v. Dean, 91 Cal. 617, 27 Am. St. Rep. 227, 28 Pac. 93.

6. Farmer v. Rogers, 10 Cal. 335.

7. Reynolds v. Reynolds, 2 Cal. Unrep. 547, 8 Pac. 184.

8. Eaton v. Southern Pacific Co., 31 Cal. App. 379, 160 Pac. 687. See supra, § 574, as to entry of judgment before death of a party.

9. Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028; Lightstone v. Laurencel, 2 Cal. 106 (vacating

pronounced in department is not final until the expiration of thirty days from its rendition, unless the chief justice and two associate justices shall approve it.[10] Within such thirty days the case is still within the jurisdiction of the court, and the judgment, as well as the opinion, is subject to its control, and may be changed, modified or vacated by the court, either in the department in which it was heard,[11] or in bank.[12] But the decision becomes final in thirty days and cannot be changed thereafter.[13] The supreme court, however, has the entire period of thirty days within which to modify its judgment, and it may order a rehearing on the last day although it be Sunday. The same principle makes effective any action of the court that may be taken after the office hours of the day and the closing of his office by the clerk.[14] And a modification if made before the expiration of the thirty-day period is valid, although the order is not filed until afterwards.[15]

affirmance for nonappearance of appellant on a showing that he had no actual notice of the hearing); Emhoff v. McMann, 3 Cal. Unrep. 243, 23 Pac. 302 (vacating provision of judgment awarding damages for frivolous appeal where the appellant was ignorant of the fact that the cause had been placed on the calendar and consequently had filed no brief); Huggins v. Handy, 2 Cal. Unrep. 854, 17 Pac. 533 (refusing to set aside an affirmance for want of brief on a showing that counsel did not expect the cause to be reached during the term). See Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565, holding that the opinion of the court is the reason for the judgment. It is the property of the justices, subject to their revision, correction and modification in any particular deemed advisable, until transcribed in the records. See supra, § 574. See infra, § 633.

10. Const., art. VI, § 2.

11. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

12. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

13. City of Oakland v. Pacific Coast L. & Mill Co., 172 Cal. 332, Ann. Cas. 1917E, 259, 156 Pac. 468; Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929; Hill v. Maryland Casualty Co., 28 Cal. App. 422, 152 Pac. 953.

14. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

15. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134 (followed in Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816); People v. Ruef, 14 Cal. App. 576, 114 Pac. 48, 54.

Judgment of district court of appeal.—By virtue of the provision of the constitution that judgments of the district court of appeal shall become final upon the expiration of thirty days after the same shall have been pronounced, a district court of appeal may change, modify or set aside its opinion and judgment before the expiration of the thirty-day period, but not afterwards. The provision that the judgment shall become "final" therein is not to be construed as rendering such judgment conclusive as to its date, of the rights of the parties, but only as divesting the district court of further power to set aside or modify its judgment.[16] Within thirty days after the judgment of a district court of appeal has become final therein, the supreme court may order the cause to be heard and determined by it.[17]

§ 594. Rehearing as Condition Precedent to Modification.—The supreme court in department has authority to modify or correct its own judgment without granting a rehearing,[18] and the supreme court in bank, may, by virtue of its supervisory jurisdiction over the action of a department, correct or modify a judgment rendered in department. The provision that within the time limited an order may be made that the cause decided in department "be heard" and decided in bank does not necessarily imply that an additional or oral argument must be made before it can be so considered. This provision merely limits the time within which the judgment may be changed or modified; it does not deprive the court of its inherent power to modify or change its judgment without such order so long as the cause is under its control. The court may exercise this power upon its own motion, irrespective of any application by a party, and it may act upon the record already before it, including the argu-

16. Noel v. Smith, 2 Cal. App. 158, 83 Pac. 167.

17. See supra, §§ 467–469.

18. O'Connor v. Flynn, 57 Cal. 293, cited in Niles v. Edwards, 95 Cal. 41, 30 Pac. 134.

ments theretofore presented, or upon additional argument, as it in its discretion deems advisable.[19]

VI. HARMLESS AND REVERSIBLE ERROR.

General Principles.

§ 595. Rule Stated.—It is a general and well-settled rule that judgments will not be reversed because of errors that are harmless, that is to say, because of errors which do not prejudice the substantial rights of the appellant or affect the result of the action.[20] Likewise, a judgment will not be reversed for error which is abstract,[1] or merely technical,[2] or immaterial,[3] or on account of errors which

19. Niles v. Edwards, 95 Cal. 41, 30 Pac. 134. In the following cases the court in bank modified the judgment rendered in department without ordering a rehearing in bank: Falkner v. Hendy, 80 Cal. 636, 22 Pac. 401; Withers v. Little, 56 Cal. 370; Pulliam v. Bennett, 55 Cal. 368; Aldrich v. Willis, 55 Cal. 81; Pollard v. Putnam, 54 Cal. 630; Langley v. Voll, 54 Cal. 435. This "practice has been so uniform that if we had any doubt as to its correctness, we would not feel authorized now to give such a construction as would imply that our predecessors were in error." Niles v. Edwards, 95 Cal. 41, 30 Pac. 134. But see Rhea v. Surryhne, 39 Cal. 581; Clark v. Boyreau, 14 Cal. 634 (per Field, C. J., on rehearing); Argenti v. San Francisco, 30 Cal. 458, and Clark v. Boyreau, 14 Cal. 634, holding that it is not proper practice to make a material modification of the judgment upon a petition for rehearing, and that such modification, if made at all, should be made only after a rehearing is had.

20. Estate of Keith, 175 Cal. 26, 165 Pac. 10; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733; Smith v. Smith, 119 Cal. 183, 51 Pac. 183; Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Mott v. Reyes, 45 Cal. 379; Satterlee v. Bliss, 36 Cal. 489; Boyce v. California Stage Co., 25 Cal. 460; Gonzales v. Huntley, 1 Cal. 32 (a cause should not be remanded for new trial unless for good cause shown); Stevenson v. Haskins, 1 Cal. Unrep. 45; Hunt v. Glassell, 32 Cal. App. Dec. 411, 191 Pac. 373.

1. Estate of Keith, 175 Cal. 26, 165 Pac. 10; Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109; Contreras v. Merck, 131 Cal. 211, 63 Pac. 336; Alexander v. Central Lumber & Mill Co., 104 Cal. 532, 38 Pac. 410.

2. Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183 (opinion in bank); People v. San Francisco & San Jose R. R. Co., 1 Cal. Unrep. 391.

3. Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; Ord v. Bartlett, 83

do not affect the substantial rights of the parties,[4] or injure the appellant,[5] or on account of errors whose injurious effects have been obviated by subsequent proceedings.[6] Although a litigant who has been denied a trial according to the law of the land, has, in a legal sense, been aggrieved, if, from the record the appellate court can see that the injury is not substantial, it is not such a grievance as will call for redress.[7] And of course a judgment will not be reversed because of an error which is favorable to the appellant,[8] or which affects only the rights of parties not appealing.[9]

§ 596. **Statutory Provision.**—Section 475 of the Code of Civil Procedure provides that:

"The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or

Cal. 428, 23 Pac. 705; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Kimball v. Wilber, 1 Cal. Unrep. 165. Immaterial assignments of error which can in no manner affect the judgment appealed from need not be reviewed; Gallatin v. Corning Irr. Co., 163 Cal. 405, 416, Ann. Cas. 1914A, 74, 126 Pac. 864, 871.

4. Conaway v. Toogood, 172 Cal. 706, 158 Pac. 200; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; McCourtney v. Fortune, 57 Cal. 617. And see, generally, cases cited supra and infra, this section; and see infra, §§ 596, 597.

5. Gates v. Salmon, 46 Cal. 361; Satterlee v. Bliss, 36 Cal. 489; Garwood v. Wood, 34 Cal. 248; Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

6. See infra, §§ 607, 608.

7. San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 324, 58 Pac. 824.

8. Clowdis v. Fresno Flume & Irr. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; Williams v. Southern Pacific Co., 110 Cal. 457, 42 Pac. 974; Wilkinson v. Parrott, 32 Cal. 102; Stockton Iron Wks. v. Walters, 18 Cal. App. 373, 123 Pac. 240 (admission of evidence favorable to appellant). See supra, § 493.

9. Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Tripp v. Duane, 74 Cal. 85, 15 Pac. 439. See supra, § 494.

defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."[10]

§ 597. **Constitutional Provision.**—In 1914, an amendment to the constitution was adopted which provides as follows:

"No judgment shall be set aside or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[11]

Prior to this amendment, the power of the court to disregard unimportant and unsubstantial errors appearing in the record was somewhat limited by its inability to consider the evidence. If the evidence as to a fact in issue were in substantial conflict, the appellate court was concluded by the decision of the trial court or jury thereon for all purposes of the case, unless the error entered into and affected the consideration of that evidence. Under this amendment it is not only within the power but it is also the duty of the appellate court to review the conflicting evidence for the purpose of ascertaining whether or not an error has resulted in a miscarriage

10. Code Civ. Proc., § 475; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 Pac. 1050; Estate of Nelson, 128 Cal. 242, 60 Pac. 772; San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 322, 58 Pac. 824; Hunt v, Sharkey, 20 Cal. App. 690, 130 Pac. 21; Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892.

11. Const., art. VI, § 4½; City of Oakland v. Adams, 37 Cal. App. 614, 174 Pac. 947; Mosley v. Seely, 32 Cal. App. Dec. 309, 191 Pac. 36; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 Pac. 134, 136; Meier v. Wagner, 27 Cal. App. 579, 150 Pac. 797.

of justice.[12] This section was not intended to abrogate or dispense with rules of procedure and evidence, however. And it would be giving it unwarranted scope to apply it to a state of facts where to do so would be in effect to say that it is not necessary to state facts sufficient to constitute a cause of action, or having stated a cause of action, it need not be supported by sufficient evidence.[13]

Just what may be included in the phrase "miscarriage of justice" must be decided in each case as it is presented, for no precise definition can be given to it.[14]

§ 598. Presumptions as to Effect of Error.—It has always been the desire and policy of the courts of review to disregard unimportant and unsubstantial errors appearing in the record and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. But because of the limitation of the power of the court to weigh the evidence for the purpose of determining whether the error had or had not in fact worked injury, just referred to, the court was bound to apply the doctrine that prejudice was presumed to follow from substantial error,[15] or as the doctrine was oftentimes stated, all errors were presumed to work injury unless it clearly appeared that no injury could have resulted. This presumption threw the burden upon the respondent to make it appear that no injury could have or did result from the errors committed by the trial court.[16] Section 475 of the Code of Civil Procedure was

12. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (per Shaw, J.).

13. J. I. Case Threshing Mach. Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647.

14. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

15. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. See supra, § 597.

16. Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861; Stark v. Wellman, 96 Cal. 400, 31 Pac. 259; Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Storch v. McCain, 85 Cal. 304, 24 Pac. 639; Hausman v. Hausling, 78 Cal. 283, 20 Pac. 570;

amended in 1897 by adding a provision that "there shall be no presumption that error is prejudicial, or that injury was done if error is shown." The constitutionality of this provision was drawn in question soon after its enactment,[17] and in several cases it has been held, notwithstanding this amendment, that prejudice would be presumed from error, unless the error was trivial or the record showed that no prejudice to a substantial right could have resulted.[18] Whatever may have been the doctrine formerly, the rule is now settled by the amendment to the constitution just referred to, that injury is not presumed from error of law, but must appear affirmatively to the mind of the court after an examination of the entire cause, including the evidence, or from the intrinsic nature of the error itself, in order to warrant a reversal.[19] The

Cleary v. City R. R. Co., 76 Cal. 240, 18 Pac. 269; In re Crozier, 74 Cal. 180, 15 Pac. 618; Duff v. Duff, 71 Cal. 513, 12 Pac. 570; Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83 (whatever may be the rule when improper evidence not changing the result has been admitted, it seems to be well settled that the exclusion of proper testimony is ground for reversal); Ponce v. McElvy, 51 Cal. 222; Sweeney v. Reilly, 42 Cal. 402; Rice v. Heath, 39 Cal. 609; Spanagel v. Dellinger, 38 Cal. 278 (distinguishing between trials by court and by jury); Norwood v. Kenfield, 30 Cal. 393; Lally v. Wise, 28 Cal. 539; Carpentier v. Williamson, 25 Cal. 154; Grimes v. Fall, 15 Cal. 63; Jackson v. Feather River & G. W. Co., 14 Cal. 19; Taggart v. Bosch, 5 Cal. Unrep. 690, 48 Pac. 1092.

17. San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 322, 58 Pac. 824.

18. Short v. Frink, 151 Cal. 83, 90 Pac. 200; Helling v. Schindler, 145 Cal. 303, 78 Pac. 710; Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35; San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 322, 58 Pac. 824 (where the court, speaking through Temple, J., said: "Under this rule any and all trial courts may refuse to be governed by the law of procedure and evidence, solemnly enacted by the legislature, and unless we can determine from the record both that the party complaining has suffered substantial injury, and that a different result would have been probable if the law of procedure had been followed, there could be no reversal"); People v. Taggart, 1 Cal. App. 423, 82 Pac. 396. But see Levy v. Noble, 135 Cal. 559, 67 Pac. 1033, holding that injury is not presumed.

19. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (citing People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042); People ex rel. Bradford v. Arcega, 33 Cal. App. Dec. 129, 193

burden now rests upon an appellant not only to show error, but also to show that the error is sufficiently prejudicial to justify a reversal.[20]

Grounds Considered.

§ 599. **Confession of Error—Stipulation.**—If the respondent confesses error and asks that the judgment be reversed, and the points made for reversal by the appellant appear to be well based, the judgment will be reversed.[1] But when the appellant contends that the findings warrant the appellate court in directing a judgment for him, the respondent should not be allowed to foreclose an examination of the record for the purpose of determining whether such a judgment is proper, by a partial confession of certain errors which may or may not be determinative of the rights of the parties.[2]

Stipulation.—A judgment may be reversed pursuant to a stipulation that it bide the event of another appeal.[3]

§ 600. **De Minimis Non Curat Lex.**—The maxim, de minimis non curat lex, precludes the reversal of a judgment or order where the amount involved is too small to justify reopening the matter.[4] So in actions ex contractu

Pac. 268; Potter v. Smith, 32 Cal. App. Dec. 547, 191 Pac. 1023; Cuddahy v. Gragg, 31 Cal. App. Dec. 790, 189 Pac. 721; Matiasick v. Pacific Electric Ry. Co., 31 Cal. App. Dec. 4, 187 Pac. 461 (it is not presumed that the trial court violated section 4½ of article VI of the constitution); Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906; J. I. Case Threshing Mach. Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647; Olson-Mahoney L. Co. v. Dunne Inv. Co., 30 Cal. App. 332, 159 Pac. 178.

20. Service v. Bedros, 180 Cal. 519, 182 Pac. 26; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 Pac. 713; Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1492, 166 Pac. 8; Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109; National Bank v. Whitney, 40 Cal. App. 276, 180 Pac. 845.

1. Waite v. Waite, 180 Cal. 238, 180 Pac. 941.

2. Sun Ins. Co. v. White, 118 Cal. 468, 50 Pac. 546.

3. Lyon v. Aronson, 140 Cal. 369, 73 Pac. 1131.

4. McDougal v. Fuller, 148 Cal. 521, 83 Pac. 701; Moore v. Boyd,

the judgment will not be reversed when it is clear that only nominal damages can be recovered on another trial.[5] This rule, however, is inapplicable to actions ex delicto, as the appellate court cannot assume, as a matter of law, that the plaintiff is entitled to nominal damages only.[6] Neither is it applicable to a case where there is involved a permanent right which does not depend upon the extent of the damage measured by a money standard.[7]

§ 601. Parties and Pleadings Generally.—A judgment will not be reversed because of harmless errors as to parties,[8] or pleadings.[9] A misjoinder[10] or nonjoinder[11] of

74 Cal. 167, 50 Pac. 670 (where the amount was one dollar and forty cents); Wolff v. Prosser, 73 Cal. 219, 14 Pac. 852; Roughton v. Brookings L. & B. Co., 26 Cal. App. 752, 148 Pac. 539 (error as to four dollars); Connell v. Harron, Rickard & McCone, 7 Cal. App. 745, 95 Pac. 916; Brady v. Ranch Min. Co., 7 Cal. App. 182, 94 Pac. 85. See Merrill v. Hurlburt, 63 Cal. 494 (holding judgment cannot be affirmed upon the maxim, De minimis, etc., where the error amounts to fifteen dollars).

5. Liljefelt v. Blum, 33 Cal. App. 721, 166 Pac. 384.

6. Von Schroeder v. Spreckels, 147 Cal. 186, 81 Pac. 515; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392; Lick v. Owen, 47 Cal. 252.

7. Arkley v. Union Sugar Co., 147 Cal. 195, 81 Pac. 509; Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11. See ACTIONS, vol. 1, p. 332.

8. Estate of Walker, 176 Cal. 402, 168 Pac. 689 (holding minors could not be prejudiced by administratrix appearing in dual capacity); Patten v. Pepper Hotel Co., 153 Cal. 460, 96 Pac. 296 (where a pledgee was joined as defendant but not as coplaintiff); Orange Growers Bank v. Duncan, 133 Cal. 254, 65 Pac. 469 (a nonjoinder of wife as coplaintiff and her joinder as defendant in a suit to foreclose a mortgage could not mislead a party where she in her cross-complaint sought all the relief she could have had as coplaintiff).

9. See infra, this section, and §§ 602, 603 and 604.

10. Allen v. Globe Grain & Mill Co., 156 Cal. 286, 104 Pac. 305 (misjoinder of a defendant); Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784 (misjoinder of joint owners of water right); Toomey v. Knobloch, 8 Cal. App. 585, 97 Pac. 529 (holding misjoinder, if any, of owners of several tracts of land in action to accomplish a common purpose was harmless). See infra, § 602.

11. Ashton v. Zeila Min. Co., 134 Cal. 408, 66 Pac. 494 (nonjoinder of assignees of stock in suit to recover stock dividends); Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892 (nonjoinder of third party whose rights have been sold and transferred to the defendant).

parties which could not have prejudiced an appellant in the slightest degree is harmless.

Sufficiency of pleadings.—A judgment for a plaintiff will be reversed if the complaint in the action does not state facts sufficient to constitute a cause of action,[12] and the defects have not been cured at the trial.[13] But under section 475 of the Code of Civil Procedure and section 4½ of article VI of the constitution, a judgment will not be reversed for mere technical defects in the complaint not affecting any substantial rights of the parties.[14] A judgment will not be reversed because of uncertainty in the complaint alone when it is clearly shown that the defendant could not have been misled to his injury.[15] Neither will it be reversed for misjoinder of causes of action when on a retrial the same judgment would be rendered.[16] Where a complaint contains several causes of action, one of which is sufficient to sustain the judgment, the judgment will not be reversed even though the other

12. Hicks v. Murray, 43 Cal. 515; Evans v. Wixom, 38 Cal. App. 542, 176 Pac. 873 (the phrase "any error as to any matter of pleading," used in the constitution, is entitled to a very liberal construction, but not to a construction which will destroy pleading as a necessary element in legal procedure).

13. See supra, §§ 70, 71.

14. Friedman v. Southern California Trust Co., 179 Cal. 266, 176 Pac. 442; Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. 645; Hallock v. Jaudin, 34 Cal. 167 (default judgment); Tropical Investment Co. v. Brown, 30 Cal. App. Dec. 1013, 187 Pac. 133 (erroneous allegation of domicile of corporation in an action of ejectment); Sledge v. Stolz, 41 Cal. App. 209, 182 Pac. 340; Gambetta v. Gambetta, 30 Cal. App. 261, 157 Pac. 1141 (when an ambiguity in a complaint is cured by the evidence, the judgment on the complaint will not be reversed because of such ambiguity).

15. Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380. See infra, § 603.

16. First Nat. Bank v. Spangler, 33 Cal. App. Dec. 57, 192 Pac. 874. See Zucco v. Farullo, 37 Cal. App. 562, 174 Pac. 929, holding that upon an appeal upon the judgment-roll from a default judgment the court will not consider the question of misjoinder of causes of action in the manner it would if a demurrer had been filed. If the complaint is sufficient as against a general demurrer, it will not be held invalid because it also states facts authorizing other relief.

counts are defective,[17] or are not sustained by the proof,[18] since, for the sake of upholding the judgment, it will be presumed to be based upon the count against which there is no valid objection.[19]

§ 602. Demurrer.—It is well settled that an error in overruling a demurrer is not ground for reversal of a judgment rendered after a trial on the merits, unless the party was misled to his prejudice, or the error otherwise appears to have been injurious.[20] This rule has been frequently applied to demurrers upon the ground of misjoinder of parties,[1] upon the ground of misjoinder of causes of action,[2] and upon the ground of uncertainty or ambiguity.[3] An error in overruling a demurrer to a part of a pleading is harmless if no proof is offered as to the

17. Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557; Terrill v. Terrill, 109 Cal. 413, 42 Pac. 137; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082. Contra, Barron v. Frink, 30 Cal. 486; Hunt v. San Francisco, 11 Cal. 250.

18. Young v. Fresno Flume & Irr. Co., 24 Cal. App. 286, 141 Pac. 29.

19. See supra, § 519.

20. Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687; Ingalls v. Monte Cristo Oil etc. Co., 176 Cal. 128, 167 Pac. 857; Collins v. Gray, 154 Cal. 131, 97 Pac. 142; Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861 (holding that substantial injury was done); Quackenbush v. Darrough, 30 Cal. App. Dec. 728, 186 Pac. 1044 (error in overruling a special demurrer is not prejudicial when the complaint is sufficient as against a general demurrer); Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784 (the overruling of a demurrer to one cause of action is without prejudice to the defendant where the court finds in his favor on that cause of action). See People v. Central Pacific R. R. Co., 76 Cal. 29, 18 Pac. 90, holding that if a demurrer is overruled, it is a determination that the pleading is good against all objections urged against it, and the order will be reversed if any of the objections is well taken.

1. Conaway v. Toogood, 172 Cal. 706, 158 Pac. 200; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612; Daly v. Ruddell, 137 Cal. 671, 70 Pac. 784; Hirshfeld v. Weill, 121 Cal. 13, 53 Pac. 402; Toomey v. Knobloch, 8 Cal. App. 585, 97 Pac. 529; Hentig v. Johnson, 8 Cal. App. 221, 96 Pac. 390.

2. Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687; Connell v. Higgins, 170 Cal. 541, 150 Pac. 769; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Levy v. Noble, 135 Cal. 559, 67 Pac. 1033; Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729.

3. See infra, § 603.

part objected to and the judgment in no way depends thereon.[4] The same is true as to an error in overruling a demurrer for misjoinder of causes of action where the trial was had upon one cause only, and the judgment is confined thereto,[5] or the court finds against all but one cause of action.[6] When a cross-complaint presents the same issues as are raised by the original pleadings, rulings upon a demurrer thereto are immaterial,[7] inasmuch as on the filing of an amended pleading, the original is superseded.[8] Any error in the ruling on a demurrer to a complaint becomes immaterial if the complaint is amended and the issues made on the amended pleading are tried and judgment rendered thereon. This rule is equally true where the complaint is amended to conform to the proofs.[9] When, however, it appears from the record that a judgment is based entirely upon a finding as to a cause of action or defense, an error in overruling a general demurrer thereto is prejudicial.[10]

Failure to rule on demurrer.—A failure to rule on a demurrer is without prejudice where the demurrer possesses no merit.[11]

4. Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 Pac. 339; Campbell v. Bear River & A. W. & Min. Co., 35 Cal. 679.

5. Harris v. Smith, 132 Cal. 316, 64 Pac. 409; Clark v. Yocum, 116 Cal. 515, 48 Pac. 498 (when the court limited the evidence to one cause of action and the case was tried upon that alone); Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34 (where the plaintiff abandoned one cause of action and introduced no evidence thereunder).

6. Savings Bank of San Diego County v. Fisher, 5 Cal. Unrep. 115, 41 Pac. 490.

7. Millan v. Hood, 3 Cal. Unrep. 548, 30 Pac. 1107 (demurrer overruled); Coyne v. Baker, 2 Cal. App. 640, 84 Pac. 269 (demurrer sustained).

8. Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523; Dieckmann v. Merkh, 20 Cal. App. 655, 130 Pac. 27.

9. Dieckmann v. Merkh, 20 Cal. App. 655, 130 Pac. 27.

10. Silvers v. Grossman, 60 Cal. Dec. 293, 192 Pac. 534.

11. Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064; Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835; McCarthy v. Yale, 39 Cal. 585. See Silcox v. Lang, 78 Cal. 118, 20 Pac. 297 (where demurrer to answer was deemed waived).

§ 603. Demurrer on Ground of Uncertainty.—The overruling of a demurrer to a complaint on the ground of uncertainty or ambiguity affords no ground for reversal when it is apparent from the record that the defendant was not thereby misled or embarrassed in making his defense.[12] To warrant a reversal, it must appear that the ruling of the court affects the substantial rights of the demurrant.[13] The court is particularly reluctant to

12. Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687; Ingalls v. Monte Cristo Oil etc. Co., 176 Cal. 128, 167 Pac. 857; Bergen v. Tulare County Power Co., 173 Cal. 709, 161 Pac. 269; Froeming v. Stockton Electric R. R. Co., 171 Cal. 401, Ann. Cas. 1918B, 408, 153 Pac. 712; Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715; Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523; Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162; Peters v. McKay & Co., 136 Cal. 73, 68 Pac. 478; Foerst v. Kelso, 131 Cal. 376, 63 Pac. 681; Contreras v. Merck, 131 Cal. 211, 63 Pac. 336; Procter v. Southern California Ry. Co., 130 Cal. 20, 62 Pac. 306; Schwind v. Hall, 129 Cal. 40, 61 Pac. 573; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Holland v. McDade, 125 Cal. 353, 58 Pac. 9; Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468; Shade v. Sisson Mill & Lumber Co., 115 Cal. 357, 47 Pac. 135; distinguished in San Francisco & S. J. Val. Ry. Co. v. Gould, 122 Cal. 601, 55 Pac. 411; Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Alexander v. Central Lumber & Mill Co., 104 Cal. 532, 38 Pac. 410; Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 30 Pac. 96; Gassen v. Bower, 72 Cal. 555, 14 Pac. 206; Warren v. Southern California Ry. Co., 6 Cal. Unrep. 835, 67 Pac. 1; Christie v. McCall, 35 Cal. App. 546, 177 Pac. 507; Myers v. Canepa, 37 Cal. App. 556, 174 Pac. 903, 906; Levy v. Dusenbery, 32 Cal. App. 411, 163 Pac. 231; Morris v. Hartley, 26 Cal. App. 61, 146 Pac. 73; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769; Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892; Krieger v. Feeny, 14 Cal. App. 538, 112 Pac. 901; Preston v. Central California Water & Irr. Co., 11 Cal. App. 190, 104 Pac. 462; Lucas v. Gobbi, 10 Cal. App. 648, 103 Pac. 157; Irrgong v. Ott, 9 Cal. App. 440, 99 Pac. 528; Lowe v. Yolo County Consol. Water Co., 8 Cal. App. 167, 96 Pac. 379; Young v. Clark, 7 Cal. App. 194, 93 Pac. 1056; Dennis v. Crocker-Huffman Land & Water Co., 6 Cal. App. 58, 91 Pac. 425; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Leonhart v. California Wine Assn., 5 Cal. App. 19, 89 Pac. 847.

13. Foerst v. Kelso, 131 Cal. 376, 63 Pac. 681; Mallory v. Thomas, 98 Cal. 644, 33 Pac. 757 (under rule that injury is presumed from error).

reverse a judgment on demurrer for ambiguity where the defendant has answered and there was a trial, for it is then in a position to judge whether the defendant was prejudiced. If there has been no answer or trial, as where on the overruling of the demurrer the plaintiff takes judgment on the default of the defendant to answer, the court has no guide but the complaint by which to determine whether the defendant is misled, and it is not necessary to make as strong a showing of prejudice.[14] If, however, the judgment is reversed for other and substantial errors, and the cause is remanded, the court below will be instructed to sustain the demurrer with leave to amend.[15] This rule is applicable also to a ruling upon a demurrer to an answer.[16] But manifestly it can have no application where there is not an entire failure to state a cause of action.[17]

§ 604. Amendment and Striking Out.—Although a court may have committed error in refusing to allow a party to amend his pleadings, such error is not prejudicial if the facts are proved on the trial as if they had been pleaded,[18] or if the party was allowed to amend during the trial,[19] or if the evidence to be adduced under such amendment is admissible under the original pleading.[20] And it is not reversible error to sustain a demurrer without leave to amend where the defects were not curable

14. Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. 468.

15. Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196.

16. Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Butler v. Delafield, 1 Cal. App. 367, 82 Pac. 260.

17. Lowe v. Yolo County Consol. Water Co., 8 Cal. App. 167, 96 Pac. 379. See PLEADING.

18. Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Pacific etc. Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Jones v. Block, 30 Cal. 227; Ray v. American Photo Player Co., 31 Cal. App. Dec. 586, 189 Pac. 130.

19. Frey v. Vignier, 145 Cal. 251, 78 Pac. 733; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

20. Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416.

by amendment.[1] The granting of leave to amend without notice of motion having been given is harmless where the motion should have been granted had notice been given.[2] A defendant is not injured by an order granting leave to amend by adding another party plaintiff when he is offered but refuses further time to answer.[3] And the service of an amended pleading on the party instead of his attorney is merely a technical error not warranting a reversal.[4]

Striking out.—Any error committed in striking out allegations in pleadings is cured when the facts alleged in the parts stricken out are, notwithstanding the order, proved on the trial and treated as in issue.[5] For the same reason the striking out of a cross-complaint is harmless where the facts are provable under the answer.[6] Granting a motion to strike out parts of a complaint is harmless where, had the motion been denied, the complaint, nevertheless, would have been bad on general demurrer.[7] An error in denying a motion to strike out portions of a complaint will not justify a reversal if the parties are not misled or prejudiced thereby,[8] or where the

1. Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 Pac. 862. See supra, § 530.

2. Baker v. Southern California Ry. Co., 114 Cal. 501, 46 Pac. 604.

3. Bhumgara v. Gazvini, 32 Cal. App. Dec. 266, 190 Pac. 854.

4. Campbell v. West, 93 Cal. 653, 29 Pac. 219, 645 (on denying petition for hearing in bank).

5. Newby v. Times-Mirror Co., 31 Cal. App. Dec. 466, 188 Pac. 1008; Kinard v. Kaelin, 22 Cal. App. 383, 134 Pac. 371. See Sloane v. Southern Cal. Ry Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320 (where a ruling striking out certain denials was obviated by an amended pleading).

6. Gallentine v. Hickey, 31 Cal. App. Dec. 676, 189 Pac. 308.

7. Fairchild v. Western Securities Corp., 176 Cal. 742, 169 Pac. 363; Basler v. Sacramento Gas & E. Co., 158 Cal. 514, Ann. Cas. 1912A, 642, 111 Pac. 530 (where the defense of contributory negligence was stricken); Moore v. Copp, 119 Cal. 429, 51 Pac. 630.

8. Procter v. Southern California Ry. Co., 130 Cal. 20, 62 Pac. 306; Higgins v. San Diego Sav. Bank, 129 Cal. 184, 61 Pac. 943 (where the court refused to strike out irrelevant and redundant matter),

error is cured by an instruction to the jury to disregard such improper matter.[9]

§ 605. Variance.—A variance which could not have misled a defendant to his prejudice in maintaining his defense on the merits is immaterial and cannot operate to overthrow the judgment.[10] Such a variance must be treated as immaterial under section 469 of the Code of Civil Procedure and will be disregarded on appeal.[11] Since, however, the relief granted in an action must be the relief sought, judgment will be reversed where the case made out by the findings is different from that presented by the pleadings.[12] In such case the variance may be objected to upon appeal from the judgment; and it has been held that the fact that it might have been cured by amendment does not make the variance less fatal to the validity of the judgment.[13] This is a cardinal rule applicable to pleadings in suits formerly denominated suits in equity as in all other pleadings.[14]

9. Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307.

10. Sparks v. Mauk, 170 Cal. 122, 148 Pac. 926; Taylor v. Morris, 163 Cal. 717, 127 Pac. 66; Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985; Tropical Inv. Co. v. Brown, 30 Cal. App. Dec. 1013, 187 Pac. 133 (immaterial variance as to the place of incorporation of the plaintiff company); Hoeft v. Hotchkiss, 33 Cal. App. Dec. 487, 194 Pac. 509 (holding the proof of defensive matter which was not pleaded is not ground for a reversal if the plaintiff was not prejudiced thereby); Howard v. D. W. Hobson Co., 38 Cal. App. 445, 176 Pac. 715.

11. Poak v. Pacific Electric Ry. Co., 177 Cal. 190, 170 Pac. 159; Ah Goon v. Tarpey, 2 Cal. Unrep. 483, 7 Pac. 188; Fielding v. Iler, 39 Cal. App. 559, 179 Pac. 519.

12. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319.

13. Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Fernandez v. Western Fuse & Explosives Co., 34 Cal. App. 420, 167 Pac. 900. See Foster v. Carr, 135 Cal. 83, 67 Pac. 43, holding the variance therein such as would authorize a reversal, but was not prejudicial where the case cannot be varied on a new trial, and the only question involved is the value of property.

14. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26 (holding that a judgment cannot be sustained where such variance exists, even though a different cause of action be fully

§ 606. Trial in General.—Errors committed upon the trial of an action which do not affect the substantial rights of an appellant are not sufficient to justify a reversal of a judgment against him.[15] The sustaining of an objection to a question propounded to a witness is harmless where the party could not have derived any advantage from any answer that could have been given thereto.[16] A refusal to strike out the answer of a witness because not responsive to the question put will not justify a reversal where the objection might have been obviated by another question.[17] And where the witness does not answer an improper question, an error in overruling an objection thereto is without injury.[18] A failure of the court in ruling on the objection to state its reasons is harmless where the objection was specific. Indeed, the instance would have to be peculiarly exceptional where prejudicial error could be predicated on the omis-

proven); Schirmer v. Drexler, 134 Cal. 134, 66 Pac. 180; Murdock v. Clarke, 59 Cal. 683.

15. Sheldon v. James, 175 Cal. 474, 2 A. L. R. 1493, 166 Pac. 8 (disregard by court of its own rules); American Nat. Bank v. Donnellan, 170 Cal. 9, Ann. Cas. 1917C, 744, 148 Pac. 188 (failure to dispose of equitable issues first); Petition of Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56 (disregard of rule of court as to notice of trial); Powley v. Swensen, 146 Cal. 471, 80 Pac. 722 (allowing pleadings to be taken to the jury-room); City of Los Angeles v. Pomeroy, 133 Cal. 529, 65 Pac. 1049 (technical objection that money deposited with the clerk was not actually carried from the treasurer's room to the courtroom); Peachy v. Witter, 131 Cal. 316, 63 Pac. 468 (refusal to grant adjournment); Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15 (error in following a wrong rule of damages where the amount of the judgment was about the same as it would have been if the correct rule had been followed); Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283 (receiving evidence out of regular order); Curnow v. Happy Valley Blue Gravel & H. Co., 68 Cal. 262, 9 Pac. 149 (error in refusing to grant separate trials to defendants held waived and not prejudicial); Fredenhall v. Shrader, 31 Cal. App. Dec. 352, 188 Pac. 580 (it is harmless error to order a reference of an account before finding the parties were entitled to an accounting).

16. Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169.

17. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 Pac. 256.

18. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

sion to give a reason for a ruling.[19] Misconduct is not ground for reversal which is not prejudicial in any way, whether it be misconduct of the trial court,[20] counsel,[1] a party,[2] a juror,[3] or a witness.[4]

Jury.—Irregularities in the formation of a jury not going to the merits will be disregarded upon appeal.[5] The disallowance of a challenge without cause is not prejudicial, although it forces a party to use a peremptory challenge, if he has a peremptory challenge left after the jury is accepted.[6] But such error is prejudicial if the party by reason thereof exhausted his peremptory challenges and was compelled to accept jurors whom he otherwise would have challenged peremptorily.[7] Whether or not section 4½ of article VI of the constitution is applicable to a case where a jury trial is denied, it is settled that the denial of the right of a trial by jury to a party entitled thereto is, in itself, a miscarriage of justice.[8] While a jury should conform to the instructions upon matters of law, an appellate court will not disregard a verdict contrary to such erroneous instruction.[9]

19. Preston v. Hirsch, 5 Cal. App. 485, 90 Pac. 965.

20. Gjurich v. Fieg, 164 Cal. 429, Ann. Cas. 1916B, 111, 129 Pac. 464 (remarks by court).

1. Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687; Fiori v. Agnew, 33 Cal. App. 284, 164 Pac. 899; Clements v. Watson, 7 Cal. App. 74, 93 Pac. 385.

2. Conroy v. Waters, 133 Cal. 211, 65 Pac. 387 (allowing plaintiff to associate with his attorney).

3. Wood v. Moulton, 146 Cal. 317, 80 Pac. 92 (misconduct on a view); Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190, 22 Pac. 590.

4. Wood v. Moulton, 146 Cal. 317, 80 Pac. 92.

5. When the verdict is only advisory to the court and the court has found upon all the issues submitted, it would seem that a mere irregularity in the formation of the jury or error in the instructions could not affect the substantial rights of the appellant. Estate of Moore, 72 Cal. 335, 13 Pac. 880.

6. Baird v. Duane, 1 Cal. Unrep. 492. See supra, § 532, as to discretion in passing upon challenges for bias.

7. Lombardi v. California Street Cable R. Co., 124 Cal. 311, 57 Pac. 66.

8. Estate of Baird, 173 Cal. 617, 160 Pac. 1078; Farrell v. City of Ontario, 39 Cal. App. 351, 178 Pac. 740.

9. O'Neill v. Thomas Day Co., 152 Cal. 357, 14 Ann. Cas. 970, 92 Pac. 856; Edwards v. Wagner, 121 Cal.

§ 607. Admission of Evidence.—A judgment will not be reversed because of an error in the admission of evidence which is harmless, and does not injuriously affect the appellant,[10] or does not result in a miscarriage of justice.[11] If evidence erroneously admitted is immaterial,[12] or does not affect the result of the action,[13] any error in admitting it is without prejudice. Rulings on the admission of evidence do not result in substantial injury where they do not involve matters of importance or significance in the proof or disproof of the ultimate issues.[14] The admission of improper evidence is harmless where

376, 53 Pac. 821; Altoona Quartz Min. Co. v. Integral Q. Min. Co., 114 Cal. 100, 45 Pac. 1047 (overruling Emerson v. Santa Clara County, 40 Cal. 543); Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Robinson v. Western Pacific R. Co., 48 Cal. 409.

10. Coonan v. Loewenthal, 129 Cal. 197, 61 Pac. 940; Solari v. Snow, 110 Cal. 387, 35 Pac. 1004; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110 (holding that in an action tried by the court, the admission of irrelevant testimony is not ground for reversal unless it is apparent that the court rested its decision upon such testimony); Carpentier v. Gardiner, 29 Cal. 160; McGarrity v. Byington, 12 Cal. 426; Carlson v. Mutual Relief Assn., 2 Cal. Unrep. 452, 6 Pac. 395; Hughes v. Parsons, 2 Cal. Unrep. 451, 6 Pac. 380 (holding an erroneous admission of evidence against the appellant to be harmless where the jury only awarded the respondent nominal damages); Butler v. Delafield, 1 Cal. App. 367, 82 Pac. 260. See Lissak v. Crocker Estate Co., 119 Cal. 442, 51 Pac. 688, holding that after insisting upon the introduction of certain evidence, a party will not be heard to urge that the error was harmless.

11. Bidegaray v. Ormaca, 32 Cal. App. Dec. 941, 192 Pac. 176.

12. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; Kidd v. Teeple, 22 Cal. 255; Adair v. Crane, 2 Cal. Unrep. 559, 8 Pac. 512.

13. Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81; Smith v. Brannan, 13 Cal. 107 (minor errors in the admission or rejection of evidence are not noticed when the whole case is before the court and it can see that no error that ought to change the result intervenes); Quinn v. Rike, 33 Cal. App. Dec. 709, 194 Pac. 761; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820; Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. 1085.

14. Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 Pac. 405, 411.

the fact thereby sought to be shown is otherwise fully and properly established by evidence which is unobjectionable,[15] or when the fact to which the evidence relates is admitted by the pleadings or is not in substantial dispute,[16] or where the objectionable evidence is afterwards withdrawn and the jury is instructed to disregard it,[17] or its consideration by the jury is limited by instruction.[18] The admission of evidence without requisite preliminary proof is harmless if the proof is afterwards supplied.[19] If a plaintiff on cross-examination of a witness for the defendant brings out testimony injurious to himself, he is not prejudiced by questions subsequently asked by the defendant along the same line of inquiry

15. Baker v. Southern Pacific Co., 60 Cal. Dec. 592, 193 Pac. 765; Schumann v. Karrer, 60 Cal. Dec. 399, 192 Pac. 849 (a refusal to strike out testimony is harmless where the appellant failed to object to similar testimony); In re Hess' Estate, 60 Cal. Dec. 235, 192 Pac. 35; Price v. Northern Electric Ry. Co., 168 Cal. 173, 142 Pac. 91; McLeod v. Barnum, 131 Cal. 605, 63 Pac. 924; Nicholson v. Randall Banking Co., 130 Cal. 533, 62 Pac. 930; Commercial Bank of Madera v. Redfield, 122 Cal. 405, 55 Pac. 160, 772; Robinson v. Nevada Bank, 81 Cal. 106, 22 Pac. 478; Steinhart v. Coleman, 5 Cal. Unrep. 162, 41 Pac. 1098; Keller v. Gerber, 33 Cal. App. Dec. 433, 193 Pac. 809; De Bock v. De Bock, 29 Cal. App. Dec. 833, 184 Pac. 890; Barrios v. Pacific States Trading Co., 41 Cal. App. 637, 183 Pac. 236; Western California Land Co. v. Welch, 41 Cal. App. 435, 183 Pac. 169; Fernandez v. Watt, 26 Cal. App. 86, 146 Pac. 47; Sharpless Separator Co. v. Skinner, 251 Fed. 25, 163 C. C. A. 275. Even though the trial court may have erred in admitting incompetent evidence, the error is harmless if there is in the record other and sufficient evidence to support the findings. Bidegaray v. Ormaca, 32 Cal. App. Dec. 941, 192 Pac. 176.

16. Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739; Curran v. Kennedy, 89 Cal. 98, 26 Pac. 641; Atkinson v. Charles Nelson Co., 41 Cal. App. 304, 182 Pac. 759; Thal v. Radke & Co., 21 Cal. App. 96, 131 Pac. 63; Brandt v. Krogh, 14 Cal. App. 39, 111 Pac. 275.

17. Rystinki v. Central Cal. Traction Co., 175 Cal. 336, 165 Pac. 952; Banning v. Marleau, 133 Cal. 485, 65 Pac. 964; Klingenstein v. Miehle Printing etc. Co., 41 Cal. App. 352, 182 Pac. 768; Southern Pacific Co. v. Stephany, 255 Fed. 679.

18. Boa v. San Francisco-Oakland Terminal Rys., 182 Cal. 93, 187 Pac. 2.

19. Robinson v. Nevada Bank, 81 Cal. 106, 22 Pac. 478; Brady v. Ranch Min. Co., 7 Cal. App. 182, 94 Pac. 85.

which assume as true the facts brought out by the plaintiff.[20] And when one cause of action is sufficiently supported by evidence, which is not tainted by error, errors in the admission of evidence relative to other causes of action become immaterial.[1]

In equitable actions.—In equitable actions in which the verdict of a jury is advisory merely, errors in admitting evidence are harmless, where, notwithstanding the verdict, the court makes findings and acts upon its own judgment.[2]

§ 608. **Exclusion of Evidence.**—A judgment will not be reversed for error in excluding evidence which is harmless, or does not prejudice the substantial rights of the appellant.[3] It is not reversible error to exclude evidence which is immaterial,[4] or could not have affected the decision upon a material fact.[5] So, also, the exclusion of evidence is harmless where the fact to be proved thereby was amply proved by other competent evidence already given and not stricken out,[6] or where substantially the

20. Ray v. Borgfeldt, 169 Cal. 253, 146 Pac. 679; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677.

1. Price v. Bekins Van & Storage Co., 179 Cal. 326, 176 Pac. 452.

2. California Electric Light Co. v. California Safe Deposit & T. Co., 145 Cal. 124, 78 Pac. 372. See infra, § 611.

3. Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733 (error in sustaining objection to evidence of qualifications of a physician called as an expert witness); Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; Garwood v. Wood, 34 Cal. 248. See Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83, quoting Arthurs v. Hart, 17 How. (U. S.) 6, 15 L. Ed. 30, see, also, Rose's U. S. Notes, to the effect that the case of the refusal of proper evidence on a trial is subject to very different considerations from those applicable to the improper admission of it, as the exclusion of the evidence might change the legal features of the cause and lead to a determination of it upon principles wholly inapplicable in case the evidence had been admitted.

4. Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; Naylor v. Ashton, 20 Cal. App. 544, 130 Pac. 181.

5. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344.

6. Schumann v. Karrer, 60 Cal. Dec. 399, 192 Pac. 849; Ash v. Soo

same testimony is subsequently admitted without objection.[7] The exclusion of evidence offered by an appellant is harmless where the court found in his favor on that issue.[8] And where the plaintiff fails to make out a prima facie case, the judgment will not be reversed on account of the exclusion of testimony which would not have tended to make such case.[9] But notwithstanding section 4½ of article VI of the constitution, it is reversible error to exclude competent evidence which would exonerate the defendant from liability.[10] So, also, it is generally error to refuse a plaintiff opportunity to present corroborating evidence.[11]

Sing Lung, 177 Cal. 356, 170 Pac. 843; Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929; Harp v. Harp, 136 Cal. 421, 69 Pac. 28; Anderson v. Black, 70 Cal. 226, 11 Pac. 700; Union Collection Co. v. Rogers, 18 Cal. App. 205, 122 Pac. 970.

7. Schumenn v. Karrer, 60 Cal. Dec. 399, 192 Pac. 849; Miller & Lux v. Richardson, 182 Cal. 115, 187 Pac. 411; Duluz v. Alaska Packers' Assn., 177 Cal. 465, 170 Pac. 1133 (it is harmless error to exclude expert evidence of foreign law where the law is proved by published reports of decisions); Callahan v. Marshall, 163 Cal. 552, 126 Pac. 358; Cordler v. Keffel, 161 Cal. 475, 119 Pac. 658; Ward v. Sherman, 155 Cal. 287, 100 Pac. 864; Schuur v. Rodenback, 133 Cal. 85, 65 Pac. 298; Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; Weinburg v. Somps, 4 Cal. Unrep. 10, 33 Pac. 341; Watterson v. Owens River Canal Co., 29 Cal. App. Dec. 344, 183 Pac. 816; Sonoma County Nat. Bank v. Skinner, 29 Cal. App. Dec. 231, 183 Pac. 464; Knight v. Bentel, 39 Cal. App. 502, 179 Pac. 406; Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041; Coos Bay Mfg. Co. v. California Selling Co., 29 Cal. App. 407, 155 Pac. 817; Vallejo & Northern R. Co. v. Home Savings Bank, 24 Cal. App. 166, 140 Pac. 974; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769; Mabry v. Randolph, 7 Cal. App. 421, 94 Pac. 403; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748, 91 Pac. 344; Kellam v. Brode, 1 Cal. App. 315, 82 Pac. 213; Hill v. McCoy, 1 Cal. App. 159, 81 Pac. 1015.

8. Laux v. Bekins Van & Storage Co., 177 Cal. 63, 169 Pac. 1012.

9. Hebrard v. Jefferson Gold & S. Min. Co., 33 Cal. 290; Yaeger v. Southern California Ry. Co., 5 Cal. Unrep. 870, 51 Pac. 190.

10. Southern California Home Builders v. Young, 31 Cal. App. Dec. 336, 188 Pac. 586. See, also, Jolley v. Foltz, 34 Cal. 321, holding it prejudicial error to exclude evidence essential to a party's defense.

11. Hockerston v. Hockerston, 41 Cal. App. 195, 182 Pac. 325, holding error harmless under the circumstances.

§ 609. Failure to Rule upon Objections.—The practice of deciding a case without declaring upon reserved rulings touching the admissibility of evidence is a practice to be reprobated. It is the better practice to decide upon the admissibility of evidence when it is offered, but if the rule be departed from, it is clearly the duty of the court at a subsequent stage of the case to rule upon the point distinctly, and if the evidence be excluded, to state on what ground.[12] It happens sometimes that the determination of the merits of the case turns on a question touching the admissibility of certain evidence, and in such event it would be proper for the court to take the question under advisement, where neither party could be prejudiced by such a course. On the other hand, the practice might in some cases seriously embarrass a party who, not knowing what the final ruling will be, cannot determine what further evidence he should introduce. Therefore, whether the practice will be ground for reversal in any given case depends upon the circumstances thereof. If it appears that the party suffered no prejudice by the reservation, the judgment will not be reversed on this account,[13] even though the appellant may have been misled to a certain extent.[14] But if it is shown that substantial injustice to a litigant resulted, the error is of sufficient gravity to call for a reversal.[15] A failure to rule on an objection to evidence is prejudicial error where the

12. Mayo v. Mazeaux, 38 Cal. 442; Sharp v. Lumley, 34 Cal. 611. See TRIAL.

13. Reclamation District No. 535 v. Clark, 155 Cal. 345, 100 Pac. 1091 (a failure to rule on a motion for nonsuit taken under advisement is harmless when there is no merit in the motion); Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491; Ebner v. West Hollywood Transfer Co., 30 Cal. App. Dec. 982, 187 Pac. 114.

14. Ebner v. West Hollywood Transfer Co., 30 Cal. App. Dec. 982, 187 Pac. 114.

15. Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562; Raymond v. Glover, 122 Cal. 471, 55 Pac. 398; City of Stockton v. Dunham, 59 Cal. 609; Doe v. Allen, 1 Cal. App. 560, 82 Pac. 568 (conceding for the purpose of the decision that the failure to rule was reversible error).

appellant, if advised by a decision of the court admitting the evidence, might have rebutted it,[16] but not where the evidence is either properly admissible or immaterial,[17] or the party has introduced all the evidence on which he relies.[18] So, also, a failure to rule on objections to offered evidence is harmless where the evidence is inadmissible because relating to an issue not properly pleaded.[19] Where evidence offered by a party is admitted subject to the objection of the adverse party, the party offering it may not be prejudiced by a subsequent failure to rule on the objection.[20]

§ 610. Nonsuit.—An error in denying a motion for nonsuit is harmless where the defect in the plaintiff's testimony is subsequently supplied by the evidence of the defendant.[1] So, also, a denial of a nonsuit as to a single cause of action is harmless where the court directs the jury to find for the defendant thereon,[2] or where counsel for the defendant in his argument states that he does not rely thereon, and the court eliminates it from the consideration of the jury.[3] And a failure to rule on such a motion is harmless when, otherwise, it is without merit.[4] An error in granting a nonsuit without a formal motion therefor, is harmless when the defects in the plaintiff's case are incurable.[5] So, also, any error in di-

16. Raymond v. Glover, 122 Cal. 471, 55 Pac. 398.

17. Ramboz v. Stowell, 103 Cal. 588, 37 Pac. 519.

18. Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562; Fissel v. Monroe, 33 Cal. App. 756, 166 Pac. 607.

19. California Raisin Growers' Assn. v. Abbott, 160 Cal. 601, 117 Pac. 767.

20. Meserve v. Pomona Land & Water Co., 5 Cal. Unrep. 759, 34 Pac. 508.

1. Russell v. Pacific Can Co., 116 Cal. 527, 48 Pac. 616; Western California Land Co. v. Welch, 41 Cal. App. 435, 183 Pac. 169; City of Oakland v. Adams, 37 Cal. App. 614, 174 Pac. 947; Cutting v. Oliphant, 27 Cal. App. 120, 148 Pac. 940; Donovan v. Kemper, 26 Cal. App. 352, 146 Pac. 1044.

2. Pacific Vinegar & Pickle Wks. v. Smith, 152 Cal. 507, 93 Pac. 85.

3. Flinn v. Crooks, 2 Cal. App. 335, 83 Pac. 812.

4. Reclamation District No. 535 v. Clark, 155 Cal. 345, 100 Pac. 1091.

5. Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Justice v. Robinson, 142

recting special findings for the defendant instead of granting a nonsuit is without prejudice where there have been two trials and the plaintiff has introduced all his evidence.[6]

§ 611. Instructions.—A judgment will not be reversed because of the giving or refusing of instructions which do not harm the appellant.[7] To justify a reversal, under the constitution it must appear, from a consideration of all the evidence, that any error in this respect resulted in a miscarriage of justice.[8] It is not necessary to invoke the remedial provision of the constitution to show that errors in instructions are harmless where the verdict would be the same with correct instructions,[9] or to show

Cal. 199, 75 Pac. 776; Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580 (where the notice of motion was too general).

6. Estate of Morey, 147 Cal. 495, 82 Pac. 57.

7. Kirk v. Santa Barbara Ice Co., 157 Cal. 591, 108 Pac. 509; Allen v. McKay & Co., 120 Cal. 332, 52 Pac. 828; Warner v. Southern Pacific Co., 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187; Los Angeles Cemetery Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. 375; Low v. Warden, 77 Cal. 94, 19 Pac. 235 (harmless error in an instruction as to a fact admitted in the pleadings); Manning v. Dallas, 73 Cal. 420, 15 Pac. 34 (holding that an error in refusing a proper instruction is harmless where the court subsequently gives an instruction covering the same ground); Robinson v. Western Pacific R. R. Co., 48 Cal. 409; Alameda County v. Tieslau, 30 Cal. App. Dec. 546, 186 Pac. 398; Werner v. Southern Pacific Co., 30 Cal. App. Dec. 372, 185 Pac. 1016 (where the court gave an erroneous instruction as to contributory negligence and the jury found there was no such negligence); Greenleaf v. Pacific Telephone & Telegraph Co., 30 Cal. App. Dec. 266, 185 Pac. 872; Metropolitan Redwood Lumber Co. v. Davis, 205 Fed. 486, 123 C. C. A. 554. See supra, § 497, as to right of appellant to complain of instructions requested by him.

8. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; Saylor v. Taylor, 29 Cal. App. Dec. 449, 183 Pac. 843; Adkins v. Brett, 30 Cal. App. Dec. 699.

9. Bechtel v. Chase, 156 Cal. 707, 106 Pac. 81; Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; In re Briswalter, 72 Cal. 107, 13 Pac. 164; Green v. Ophir Copper, S. & G. Min. Co., 45 Cal. 522; Levitzky v. Canning, 33 Cal. 299; Spear v. United Railroads, 16 Cal. App. 637, 117 Pac. 956; Greene v. Murdock, 1 Cal. App. 136, 81 Pac. 993 (where the plaintiff

that an instruction that the plaintiff or defendant is entitled to recover is not prejudicial where it is clear from the record that a verdict for the opposite party would be contrary to the evidence.[10] The giving of an instruction upon an abstract proposition of law not entirely applicable to the case will not warrant a reversal where it is apparent no injury resulted therefrom.[11] And neither the giving nor refusal of instructions relating to commonplace matters that jurors are presumed to know, constitutes prejudicial error unless injury is shown.[12] However, an erroneous instruction which is such as to cut off a substantial defense on the merits is prejudicial.[13]

While a conflict between instructions in essential particulars is ground for reversal,[14] a reversal is not justified where the instructions are correct as a whole,[15] or where the conflict relates to matters not properly before the jury,[16] or could not have misled the jury,[17] or generally

should have been nonsuited). See supra, § 606.

"Where the court lays down an erroneous principle of law, but it appears that nevertheless the verdict of the jury is necessarily correct upon the evidence before them . . . the error is harmless." Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386.

10. City of Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. 883; Levitzky v. Canning, 33 Cal. 299; Blackwell v. American Film Co., 32 Cal. App. Dec. 937, 192 Pac. 189.

11. Estate of Clark, 180 Cal. 395, 181 Pac. 639; Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993 (citing People v. Romero, 143 Cal. 458, 77 Pac. 163); Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; George v. Los Angeles Ry. Co., 126 Cal. 357, 77 Am. St. Rep. 184, 46 L. R. A. 829, 58 Pac. 819; Satterlee v. Bliss, 36 Cal. 489; Randolph v. Hunt, 41 Cal. App. 739, 183 Pac. 358.

12. Poor v. W. P. Fuller & Co., 30 Cal. App. 650, 159 Pac. 233; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

13. Burnham v. Stone, 101 Cal. 164, 35 Pac. 627.

14. Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; Brown v. McAllister, 39 Cal. 573; Monroe v. Cooper, 2 Cal. Unrep. 449, 6 Pac. 378; Hayden v. Consolidated Min. & D. Co., 3 Cal. App. 136, 84 Pac. 422.

15. People v. Tomlinson, 66 Cal. 344, 5 Pac. 509; Brooks v. Crosby, 22 Cal. 42. See supra, § 509, as to construction of instructions.

16. Estate of Gharky, 57 Cal. 274.

17. Fitzgerald v. Southern Pacific Co., 36 Cal. App. 660, 173 Pac. 91; Hayden v. Consolidated Min. & D. Co., 3 Cal. App. 136, 84 Pac. 422.

where they do not prejudice the appellant.[18] The crucial test is whether a man of ordinary intelligence reading the charge intended for his guidance would be unable to ascertain its meaning as a whole, by inherent contradictions creating confusion and doubt in his mind touching his duty as a juror.[19]

In equitable actions.—Errors in instructing a jury in an equitable action are harmless as the verdict is merely advisory.[20]

§ 612. Findings and Verdict.—Errors and irregularities in a verdict or findings which are without prejudice will not justify a reversal.[1] A judgment cannot be sustained which rests for its validity and support upon some particular finding which is unsupported by the evidence,[2] or is outside the issues made by the pleadings,[3] or which is itself based upon a count in the complaint which states no cause of action.[4] But if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal

18. Dennison v. Chapman, 105 Cal. 447, 39 Pac. 61.

19. Hayden v. Consolidated Min. & D. Co., 3 Cal. App. 136, 84 Pac. 422 (per McLaughlin, J.).

20. Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Estate of Moore, 72 Cal. 335, 13 Pac. 880; Dominguez v. Dominguez, 7 Cal. 424.

1. Pettit v. Forsyth, 15 Cal. App. 149, 113 Pac. 892 (an error as to the amount of a verdict due to a misapprehension of the court's instructions is without prejudice where the court's proposed modification of the judgment in this respect was assented to by the plaintiff).

2. People's Lumber Co. v. McIntyre & Peters, 179 Cal. 780, 178 Pac. 954; American Nat. Bank v. Donnellan, 170 Cal. 9, Ann. Cas. 1917C, 744, 148 Pac. 188; Thayer v. Tyler, 169 Cal. 671, 147 Pac. 979; Crescent Feather Co. v. United Upholsterers' Union, 153 Cal. 433, 95 Pac. 871; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008; Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532; Driscoll v. Market Street Cable Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; Harper v. Minor, 27 Cal. 107; Jones v. Desmond, 2 Cal. Unrep. 455, 6 Pac. 420; Estate of Lindner, 13 Cal. App. 208, 109 Pac. 101.

3. See infra, § 613.

4. Du Brutz v. Jessup, 70 Cal. 75, 11 Pac. 498.

that such other findings are unsupported by evidence,[5] or are uncertain or otherwise defective.[6] However unsupported or inconclusive any number of findings may be, if in any case there be at least one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the court rested its judgment upon that finding (or such findings) and the others will be disregarded.[7] Moreover, any error in finding against an appellant on a particular issue is without prejudice to him, if the judgment gave him all the relief to which he was entitled had the finding been in his favor.[8] So, also, a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sustained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial.[9]

5. Winbigler v. Sherman, 175 Cal. 270, 165 Pac. 943; De Gottardi v. Donati, 155 Cal. 109, 99 Pac. 492; Collins v. Gray, 154 Cal. 131, 97 Pac. 142; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; Auburn Opera House & P. Assn. v. Hill, 113 Cal. 382, 45 Pac. 695; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Clavey v. Lord, 87 Cal. 413, 25 Pac. 493; Bowen v. Hickey, 32 Cal. App. Dec. 644, 191 Pac. 971; Austin v. Newton, 31 Cal. App. Dec. 734, 189 Pac. 471; Dalton v. Pacific Elec. Ry. Co., 7 Cal. App. 510, 94 Pac. 868; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398; Rose v. Doe, 4 Cal. App. 680, 89 Pac. 135. Where the plaintiff is entitled to judgment because the material allegations in his complaint are not denied, a judgment in his favor will not be reversed because of an insufficiency of evidence introduced at the trial. Blodgett v. Scott, 11 Cal. App. 310, 104 Pac. 842.

6. American Nat. Bank v. Donnellan, 170 Cal. 9, Ann. Cas. 1917C, 744, 148 Pac. 188; San Francisco & S. J. Val. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473; Continental Nat. Bank v. Stoltz, '31 Cal. App. Dec. 761, 189 Pac. 712.

7. American Nat. Bank v. Donnellan, 170 Cal. 9, Ann. Cas. 1917C, 744, 148 Pac. 188.

8. Pugh v. Moxley, 164 Cal. 374, 128 Pac. 1037.

9. Estate of Hellier, 169 Cal. 77, 145 Pac. 1008; California Wine Assn. v. Commercial Union Fire Ins. Co., 159 Cal. 49, 112 Pac. 858; Big Three Min. & Mill Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301; Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364; Crosett v. Whelan, 44 Cal. 200.

Conflict between findings.—Where there are contradictory findings about material matters and the determination of them one way or the other is essential to the correctness of the judgment, the judgment cannot stand.[10] However, findings are to be liberally construed in support of the judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points.[11] And a judgment will not be reversed on account of a conflict in the findings unless the conflict is clear, and the findings are incapable of being harmoniously construed.[12] If the conflict arises out of a clerical error, the error will be disregarded.[13] Where the ultimate facts in issue are found by the court, a contradictory finding as to a probative fact involved therein has no effect.[14] And an immaterial variance between the findings and the conclusions of law will not authorize a reversal.[15]

Miscellaneous errors.—Neither clerical errors in the findings nor conclusions,[16] nor surplusage,[17] nor a commingling of findings and conclusions[18] necessitate a re-

10. Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Southmayd v. Berry, 2 Cal. Unrep. 322, 3 Pac. 893 (where the findings were inconsistent with each other and with the averments of the complaint).

11. Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005. See supra, § 511.

12. Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005; Adler v. Sawyer, 40 Cal. App. 778, 181 Pac. 817.

13. Del Monte Ranch Dairy v. Bernardo, 174 Cal. 757, 164 Pac. 628.

14. Lucas v. Richardson, 68 Cal. 618, 16 Pac. 183.

15. Field v. Burr, 129 Cal. 44, 61 Pac. 665 (where the word "plaintiff" was inadvertently used for the word "intervener").

16. Del Monte Ranch Dairy v. Bernardo, 174 Cal. 757, 164 Pac. 628; Field v. Burr, 129 Cal. 44, 61 Pac. 665 (clerical error in conclusions of law in using word "plaintiff" for "intervener"); Doolan v. Cunningham, 2 Cal. Unrep. 414, 4 Pac. 1193 (where in the conclusions of law the word "defendant" was used instead of "defendants"); Johnstone v. Gloster, 33 Cal. App. Dec. 464, 194 Pac. 504.

17. Mitchell v. Mitchell, 31 Cal. App. Dec. 397, 188 Pac. 585.

18. Spencer v. Duncan, 107 Cal. 423, 40 Pac. 549 (an erroneous conclusion of law is not ground for reversal if the judgment is right); Butler v. Agnew, 9 Cal. App. 327, 99 Pac. 395. See Pacific Gas & Electric Co. v. Rollins, 32 Cal. App. 782, 164 Pac. 53.

versal. To make findings disposing of legal issues is not prejudicial error.[19] And a judgment correct in substance will not be reversed because of an erroneous special verdict,[20] or because of errors in the conclusions of law.[1] But since an appellate court cannot assume the truth or falsity of allegations in the pleadings either by reference to the testimony or the facts actually found, it must reverse when the findings are indecisive as to what allegations were found to be true and what false.[2]

§ 613. Findings Outside the Issues.—As findings of fact are required to respond to and be within the issues raised by the pleadings, findings outside the issue cannot be considered when determining whether the judgment is supported by the findings.[3] If, without these findings, the judgment is insufficiently supported, it must be reversed.[4] But in this connection, it must be remembered that issues may be made at the trial as well as by the pleadings. And if the parties treat certain matters as in issue, they will not afterwards be heard to say that no such issue was raised on the trial.[5] The mere fact

19. Estudillo v. Security Loan & Trust Co., 158 Cal. 66, 109 Pac. 884.

20. Lafonton v. Gaucheron, 1 Cal. Unrep. 30.

1. Lange v. Waters, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889 (conclusions of law, no matter how erroneous, constitute no ground for reversal of a judgment supported by the findings); Spencer v. Duncan, 107 Cal. 423, 40 Pac. 549.

2. Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 Pac. 1125 (where the only finding was that the plaintiff's allegations were true and the allegations in the answer "inconsistent" therewith were not true); Harlan v. Ely, 55 Cal. 340 (where it was found that all the "material" allegations of a pleading are true).

3. Knoch v. Haizlip, 163 Cal. 146, 124 Pac. 998; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137, 487; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429; Estate of Doyle, 73 Cal. 564, 15 Pac. 125; Silvey v. Neary, 59 Cal. 97; Hill v. Den, 54 Cal. 6; Bradbury v. Cronise, 46 Cal. 287; Fiske v. Casey, 4 Cal. Unrep. 558, 36 Pac. 668.

4. White v. Douglass, 71 Cal. 115, 11 Pac. 860.

5. Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Ortega v. Cordero, 88

that certain findings are outside the issues becomes immaterial, however, if the judgment is amply supported by other proper findings.[6] This rule is applicable where findings are contrary to admissions in the pleadings. Such findings are outside the issues, and if the judgment is not sufficiently supported by other findings, it must be reversed.[7]

§ 614. Failure to Find.—The absolute right to have a material issue presented by the pleadings determined by a finding of the court is one important to the parties to a suit, and the failure to make a finding thereon results in prejudicial error entitling the complaining suitor to a reversal,[8] provided it appears from the record that there was evidence introduced as to such issue, and the evidence was sufficient to sustain a finding in favor of such party.[9]

Cal. 221, 26 Pac. 80. See supra, § 69, and see supra, § 511, as to presumption in this respect.

6. Peardon v. Markley, 33 Cal. App. Dec. 723, 195 Pac. 70; Spencer v. Deems, 30 Cal. App. Dec. 211, 185 Pac. 671.

7. Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; Traverso v. Tate, 82 Cal. 170, 22 Pac. 1082; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Reinhart v. Lugo, 75 Cal. 639, 18 Pac. 112; White v. Douglass, 71 Cal. 115, 11 Pac. 860; Burnett v. Stearns, 33 Cal. 468.

8. Tucker v. United Railroads, 171 Cal. 702, 154 Pac. 835 (issue of contributory negligence); Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297; Conway v. Supreme Council, Catholic Knights of America, 131 Cal. 437, 63 Pac. 727; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Kimball v. Stormer, 65 Cal. 116, 3 Pac. 408; McCourtney v. Fortune, 57 Cal. 617; Phipps v. Harlan, 53 Cal. 87 (failure to find upon affirmative defense); Shaw v. Wandesforde, 53 Cal. 300; Baggs v. Smith, 53 Cal. 88; Phipps v. Harlan, 53 Cal. 87; Porteous v. Reed, 2 Cal. Unrep, 707, 12 Pac. 117 (issue of statute of limitations); Conklin v. Stone, 2 Cal. Unrep. 449, 6 Pac. 378; West v. Girard, 2 Cal. Unrep. 360, 4 Pac. 565; Hawes v. Green, 2 Cal. Unrep. 286, 3 Pac. 496; Duane v. Neumann, 2 Cal. Unrep. 255, 2 Pac. 274, 410; Frascona v. Los Angeles Ry. Corp., 32 Cal. App. Dec. 522, 191 Pac. 968; Maxwell v. Western Auto Stage Co., 31 Cal. App. Dec. 769, 189 Pac. 710 (where there was a failure to find on an issue of contributory negligence); Huntington v. Vavra, 36 Cal. App. 352, 172 Pac. 166 (issue of contributory negligence); Williams v. Pratt, 10 Cal. App. 625, 103 Pac. 151.

9. See infra, this section.

On the other hand, a failure to find upon an issue is not ground for reversal when no substantial rights of the appellant are prejudiced thereby;[10] as is the case, when the issue as to which there is no finding is immaterial and the finding if made and in appellant's favor would not require a different judgment.[11] Where the facts found sustain the judgment, an omission to find upon immaterial issues, a finding upon which would not necessitate any change in the judgment, is not ground for reversal.[12] In short, the failure to find on any issue not necessary to support the judgment is harmless.[13]

Even in case the omitted issue is a material one, a failure to make a finding thereon which would simply have the effect of invalidating a judgment fully supported by the findings made is without prejudice, if the finding must necessarily have been adverse to the appellant.[14] If the

10. McCourtney v. Fortune, 57 Cal. 617; Mushet v. Fox, 6 Cal. App. 77, 91 Pac. 534; Beggs v. Smith, 26 Cal. App. 532, 147 Pac. 585; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820.

11. Hertel v. Emireck, 178 Cal. 534, 174 Pac. 30; Smith v. Smith, 173 Cal. 725, 161 Pac. 495; Baker v. Baker, 168 Cal. 346, Ann. Cas. 1916A, 854, 143 Pac. 607; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Garvey v. Lashells, 151 Cal. 526, 91 Pac. 498; Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569; Blochman v. Spreckels, 135 Cal. 662, 57 L. R. A. 213, 67 Pac. 1061; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675; Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Robinson v. Placerville & Sacramento Valley R. R. Co., 65 Cal. 263, 3 Pac. 878; Johnson v. Perry, 53 Cal. 351; Weichers v. Dehail, 41 Cal. App. 547, 183 Pac. 187; Vujacich v. Southern Commercial Co., 21 Cal. App. 439, 132 Pac. 80.

12. McRae v. Ross, 170 Cal. 74, 148 Pac. 215; Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675; Bayside Land Co. v. Phillips, 29 Cal. App. Dec. 801, 184 Pac. 951; Janke v. McMahon, 21 Cal. App. 781, 133 Pac. 21.

13. Southern Pacific R. R. Co. v. Dufour, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783 (per Paterson, J., specially concurring).

14. Reed v. Johnson, 127 Cal. 538, 59 Pac. 986; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Hutchings v. Castle, 48 Cal. 152; Newman v. Maldonado, 3 Cal. Unrep. 540, 30 Pac. 833; Byron Jackson

burden of that issue is upon the appellant, and no evidence was introduced thereon, the finding, if made, would have been adverse to him, and he is not injured by a failure to make such a finding.[15] In other words, a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held to be a ground for reversal, unless it be shown by statement or bill of exceptions that evidence was submitted in relation to such issue.[16] Not only must it appear that evidence was introduced upon such omitted issue, but it must appear also that the evidence was sufficient to warrant a finding for the appellant.[17] The appellant is not preju-

Iron Wks. v. Hoge, 33 Cal. App. Dec. 425, 194 Pac. 45; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820; Downing v. Donegan, 1 Cal. App. 710, 82 Pac. 1111.

15. Kelly v. Woolsey, 177 Cal. 325, 170 Pac. 837; Mohr v. North Rawhide Mining & D. Co., 177 Cal. 264, 170 Pac. 600; Estate of Barclay, 152 Cal. 753, 93 Pac. 1012; People v. McCue, 150 Cal. 195, 88 Pac. 899; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848; Giletti v. Saracco, 110 Cal. 428, 42 Pac. 918; F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Wise v. Burton, 73 Cal. 174, 14 Pac. 683; Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Hutchings v. Castle, 48 Cal. 152 (where there is no legal evidence sufficient to justify a finding that a sale was made to hinder, delay or defraud a creditor, an omission to find that it was not made with such intent is not prejudicial); Newman v. Maldonado, 3 Cal. Unrep. 540, 30 Pac. 833; Gordon v. Tejunga Water & Power Co., 31 Cal. App. Dec. 606, 189 Pac. 288; Haun v. Rosenmayer, 31 Cal. App. Dec. 602, 189 Pac. 117; Wood v. Dailey, 30 Cal. App. Dec. 452, 186 Pac. 177; Terry v. Southwestern Bldg. Co., 30 Cal. App. Dec. 41, 185 Pac. 212; National Bank v. Whitney, 40 Cal. App. 276, 180 Pac. 845; Williams v. Pratt, 10 Cal. App. 625, 103 Pac. 151; Downing v. Donegan, 1 Cal. App. 710, 82 Pac. 1111.

16. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098 (per Beatty, C. J., explaining Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239).

17. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504 (explaining Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098); Wood v. Dailey, 30 Cal. App. Dec. 452, 186 Pac. 177; Terry v. Southwestern Bldg. Co., 30 Cal. App. Dec. 41, 185 Pac. 212. See supra, § 512, presumption as to evidence to support findings.

diced unless the court shall fail to make such findings in his behalf as will counterbalance its other findings.[18] And as error is not presumed, it is incumbent upon the appellant to cause the record to show that such finding was required by the evidence.[19] A failure to make a more complete finding on an issue is not ground for reversal where it necessarily would be adverse to the appellant.[20]

§ 615. Judgment, New Trial and Proceedings Thereafter.—Mere errors or irregularities in a judgment or proceedings thereafter do not constitute ground for reversal, if the appellant is not prejudiced thereby.[1] But a judgment cannot be sustained which is inconsistent with and is not supported by the findings;[2] and this is the rule also where the determination of the court is at variance with the facts recited in the judgment.[3] Such a judgment cannot be upheld even though the findings are not supported by the evidence, as it is not the province

18. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

19. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

20. Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309.

1. Modesto Creamery v. Stanislaus Creamery Co., 168 Cal. 289, 142 Pac. 845 (technical error in judgment in trademark case); Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 Pac. 1003 (error in judgment favorable to appellant); George v. Silva, 68 Cal. 272, 9 Pac. 257 (harmless error in taxation of costs); Stoddart v. Burge, 53 Cal. 394 (misnomer in designating it a judgment upon the pleadings); Sais v. Sais, 49 Cal. 263 (failure to require incompetent reporter to file notes of testimony); Brown v. Johnson, 45 Cal. 76 (a failure to award return of property in a replevin suit is harmless where the property was lost or destroyed); Webster v. King, 33 Cal. 348 (insertion of harmless matter in judgment); Taugher v. Richmond Dredging Co., 33 Cal. App. 303, 165 Pac. 31 (error in rendering judgment in fixed sum against corporation and stockholder); Crouse-Prouty v. Rogers, 33 Cal. App. 246, 164 Pac. 901 (error in decree quieting title which did not direct execution of conveyance); Joost v. Dore, 27 Cal. App. 729, 151 Pac. 29 (failure to award complete relief in action to set aside a foreclosure sale); Jump v. Barr, 31 Cal. App. Dec. 624, 189 Pac. 334 (irregularity in including in judgment findings and conclusions).

2. Rush v. Casey, 39 Cal. 339.

3. Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403.

of a court on appeal from a judgment to look into the evidence with a view to reform the findings and enter a judgment in accordance with what the findings should be.[4] When general findings and the judgment thereon are inconsistent with special findings, the judgment will be reversed as not supported by the findings.[5] So, also, a judgment will be reversed which is not supported by the pleadings,[6] or is uncertain in itself and is not made certain by a reference therein.[7]

New trial.—While a trial court has a large discretion as to the granting of a new trial,[8] an order granting a new trial will be reversed, where no legal ground existed for setting aside the judgment,[9] or where upon the undisputed facts found, but one conclusion of law is possible,[10] or where no notice of intention to move for a new trial was given or waived.[11] So, also, an order denying a new trial will be reversed where the evidence does not sustain a material finding.[12] But errors in the proceedings upon a motion which do not prejudice the substantial rights of the appellant are not grounds for reversal.[13]

4. Rush v. Casey, 39 Cal. 339. See supra, § 588.

5. Geer v. Sibley, 83 Cal. 1, 23 Pac. 220.

6. Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442. See supra, § 601.

7. Kelley v. McKibben, 53 Cal. 13.

8. See supra, §§ 533–536, inclusive.

9. Chambers v. Farnham, 39 Cal. App. 17, 179 Pac. 423.

10. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 Pac. 1037; Hitchcock v. Rooney, 171 Cal. 285, 152 Pac. 913; Flood v. Petry, 165 Cal. 309, 46 L. R. A. (N. S.) 861, 132 Pac. 256.

11. Harris v. Careaga, 2 Cal. Unrep. 242, 2 Pac. 41.

12. Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119 (a finding as to damages).

13. Peters v. Peters, 156 Cal. 32, 23 L. R. A. (N. S.) 699, 103 Pac. 219 (that verdict for defendant against evidence is immaterial where action is not maintainable); Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831 (to dismiss instead of deny is harmless when the motion is without merit); Swett v. Gray, 141 Cal. 63, 74 Pac. 439 (failure to serve notice of motion); Barnes v. Berendes, 139 Cal. 32, 72 Pac. 406 (the filing of affidavits after decision of motion is harmless when they are not considered); Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113 (a failure to give notice of settlement of statement is harmless if proposed amendments were all adopted); McLean v. Crow, 88 Cal. 644, 26 Pac. 596 (the denial of the motion pend-

VII. REMITTITUR AND PROCEEDINGS IN LOWER COURT AFTER REMAND.

Remittitur, Its Issuance and Filing.

§ 616. Definition and Nature.—Formerly, when a writ of error was issued out of the House of Lords to the court of King's Bench, the original record was itself taken to that body with the return upon the writ, and the judgment of the House of Lords was afterwards entered upon this record with the recital that it is sent back—remittitur—to be carried into effect by the court of King's Bench. In California, and in many other jurisdictions, the original record remains in the court from which the appeal is taken, and a transcript thereof is filed with the appellate court for its consideration. By reason of these changes in procedure and in the mode by which the appellate tribunal obtains jurisdiction to review the judgment of the lower court, and also by reason of the increased exercise of its appellate jurisdiction in modern days by controlling in advance the action of inferior courts, the word "remittitur" has received an additional meaning to that originally given to it, and is the term employed to designate the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken or over which its controlling jurisdiction is exercised, and corresponds to the "mandate" used in the practice of the United States supreme court.[14] The certificate of the clerk of the appellate court referred to in section 958 of the Code of Civil Procedure is called a remittitur.[15]

ing an application to the supreme court is without prejudice where the application was subsequently denied by the supreme court); Arnold v. City of San Jose, 81 Cal. 621, 22 Pac. 878 (denial of motion to disregard statement). See supra, §§ 476–479, inclusive, the reasons leading the trial court to its conclusion are immaterial.

14. Noel v. Smith, 2 Cal. App. 158, 83 Pac. 167.

15. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

The office of a remittitur is to return the proceedings to the trial court and reinvest it with jurisdiction over the cause. When the remittitur has been duly issued by the appellate court and duly filed in a superior court, the proceedings from time to time are in the superior court, the appellate court being thereupon divested of jurisdiction.[16]

§ 617. Form, Issuance and Filing.—The code, following the constitution, requires that in all cases appealed to the supreme court or to a district court of appeals, the judgment of the appellate tribunal "shall be remitted to the court from which the appeal was taken."[17]

"It must be certified by the clerk of the supreme court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered."[18]

And "a certified copy of the opinion in the case shall be transmitted with the remittitur."[19] When the remittitur is received by the clerk of the superior court, it must be filed by him unless his fees therefor are not paid or tendered or some other sufficient reason exists for refusing to do so.[20]

"In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry.

16. See infra, § 633.

17. Code Civ. Proc., § 53. While this code section mentions only the supreme court, article VI, section 4, of the constitution provides that all statutes regulating appeals to the supreme court shall apply to appeals to district courts of appeal. "In all cases of appeal transferred to the supreme court, its judgment shall be remitted to the superior courts of the counties or cities and counties from which the appeals were taken respectively, with the same force and effect as if said cases had been appealed to the supreme court from such superior courts." Code Civ. Proc., § 56.

18. Code Civ. Proc., § 958.

19. Supreme court rule XXI.

20. See Mabb v. Stewart, 7 Cal. Unrep. 186, 77 Pac. 402, in which in favor of a long delay of the clerk in filing the remittitur it was presumed that it was because the fee for filing had not been paid or tendered or that there was some other sufficient cause.

In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed or modified by the supreme court on appeal."[1]

When this is done the judgment of the appellate court stands as the judgment of the superior court.[2]

In case of dismissal.—A remittitur goes in the case of a dismissal as well as in other cases.[3]

Form.—There is no peculiar form for a remittitur, as it will vary according to the views of the appellate court as to the proper course to be pursued by the trial court after remand.[4] Rule XXIII of the supreme court, however, requires the clerk to insert a direction for costs in the remittitur, in all cases of affirmance, reversal or modification in which the decree contains no such direction.[5]

§ 618. **Time of Issuance.**—The time of issuing the remittitur has been left to the court to regulate, and rules have been made fixing the period after judgment during

1. Code Civ. Proc., § 958; Fischer v. Lukens, 41 Cal. App. 358, 182 Pac. 967 (presuming the statute was complied with, there being no evidence in the record to the contrary).

2. McMann v. Superior Court, 74 Cal. 108, 15 Pac. 448 (holding no order of superior court necessary for entry of judgment on remittitur); McMillan v. Richards, 12 Cal. 467 (under Practice Act, § 358, corresponding to Code Civ. Proc., § 958. See supra); Marysville v. Buchanan, 3 Cal. 212.

3. Bolander v. Gentry, 36 Cal. 127.

4. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196. See Estate of Blythe, 118 Cal. 347, 50 Pac. 545 (setting out mandate issuing from the United States supreme court to supreme court of California).

5. Estate of Prager, 167 Cal. 737, 141 Pac. 369 (decided before the rule contained such direction to the clerk in case of affirmance, and holding the omission in this respect did not deprive the party of his costs); Baker v. Southern Cal. Ry. Co., 130 Cal. 113, 62 Pac. 302; Burr v. Maclay Rancho Water Co., 26 Cal. App. 611, 147 Pac. 990 (presuming clerk performed his duty in this respect); Morgrage v. National Bank, 25 Cal. App. 133, 142 Pac. 1124. See COSTS, as to costs on appeal.

which the remittitur should be retained.[6] Because of the fact that the appellate court loses jurisdiction of a case by the regular issuance and filing of the remittitur in the court below,[7] and in order to afford parties who desire it an opportunity of moving for a rehearing or to amend, modify or set aside the judgment, one of the long-standing rules of the supreme court has been that no remittitur to the court below shall issue for a limited time after decision.[8] By a standing order, all remittiturs are directed to issue thirty days after judgment, unless a petition for rehearing is filed.[9]

The time for the issuance of remittitur when the case is decided by a district court of appeal is prescribed by supreme court rule XXXIV, as follows:

"When a judgment of a district court of appeal becomes final therein, the remittitur shall not be issued until after the lapse of thirty days thereafter, unless otherwise ordered."

Staying issuance.—The same principle upon which courts of common law stay the execution of their judgments when necessary to accomplish the ends of justice[10] applies to appellate courts in reference to their power to stay the issuance of its remittitur. But this power will be exercised only when some extraordinary reason appears.[11]

§ 619. Effect of Issuance upon Jurisdiction.—It is clear that jurisdiction of a cause which has been appealed is

6. Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742.

7. See infra, § 633.

8. Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742; Blanc v. Bowman, 22 Cal. 24 (per Crocker, J.).

9. Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742; Hogs Back Con. Min. Co. v. New Basil etc. Co., 65 Cal. 22, 2 Pac. 489; Haight v. Kary, 1 Cal. Unrep. 3 (formerly the time was ten days after judgment).

10. See EXECUTIONS.

11. Reynolds v. E. Clemens Horst Co., 36 Cal. App. 529, 172 Pac. 623 (granting stay to afford opportunity to apply to the supreme court of the United States for a writ of certiorari).

revested in the trial court when the remittitur of the appellate court has been regularly issued and when the provisions of section 958 of the Code of Civil Procedure have been complied with.[12] The jurisdiction of the trial court does not depend upon a compliance with this statute, however, for it has been specifically held that the failure of the clerk to make the entries required by this section does not deprive the superior court of jurisdiction or keep alive the stay of execution on appeal.[13] There is no express statement in the statute as to the precise point at which jurisdiction is transferred. It has several times been held that the jurisdiction of the superior court attaches when the remittitur is regularly issued and filed with the clerk with whom the judgment-roll is filed.[14] The code does not, however, call for a separate filing mark on the remittitur, and there is settled authority to the effect that all jurisdiction of the appellate court is divested on the instant the remittitur goes down.[15] Since jurisdiction of a pending cause must rest in some court, it seems clear that the jurisdiction of the superior court attaches immediately upon the issuance of the remittitur and before filing.[16]

12. Fischer v. Lukens, 41 Cal. App. 358, 182 Pac. 967.

13. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

14. Rowland v. Kreyenhagen, 24 Cal. 52; Blanc v. Bowman, 22 Cal. 23; Grogan v. Ruckle, 1 Cal. 193.

15. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816; Richardson v. Chicago P. & P. Co., 135 Cal. 311, 67 Pac. 769; In re Wharton, 130 Cal. 486, 62 Pac. 741; Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008; Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Leese v. Clark, 20 Cal. 387; Davidson v. Dallas, 15 Cal. 75. See Haight v. Kary, 1 Cal. Unrep. 3 (the court oses jurisdiction when the time expires for the remittitur to issue).

16. Fischer v. Lukens, 41 Cal. App. 358, 182 Pac. 967, 178 Pac. 302 (holding an execution sale valid where the remittitur was dated May 9, 1910, and filed September 13, 1916, nunc pro tunc May 11, 1910, and the writ of execution was taken out August 1, 1913, and the sale was had September 8, 1913).

Effect of Decision upon Appeal as Law of Case.

§ 620. In General.—The determination of an appellate court of the rights of the parties in an appeal from the superior court is a final adjudication of those rights, and the questions of law decided by such court become the rule for the guidance of the trial court if the same questions are again presented in that controversy upon a retrial of the issues.[17] The decision has become the law

17. Estate of Carothers, 168 Cal. 691, 144 Pac. 957 (decision as to construction of will); Kinard v. Jordan, 167 Cal. 333, 139 Pac. 797; Gallatin v. Corning Irr. Co., 163 Cal. 405, 422, Ann. Cas. 1914A, 74, 126 Pac. 864, 871 (on application for modification of judgment); Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200; Ellis v. Witner, 148 Cal. 528, 531, 83 Pac. 800; James v. E. G. Lyons Co., 147 Cal. 69, 81 Pac. 275; Weaver v. San Francisco, 146 Cal. 728, 81 Pac. 119 (the terms and conditions of the judgment cannot be altered or modified by bringing another action founded upon it); Snyder v. Jack, 140 Cal. 584, 74 Pac. 139; Senior v. Anderson, 138 Cal. 716, 72 Pac. 349 (law of case on third trial); Turner v. Hearst, 137 Cal. 232, 70 Pac. 18 (a decision that whether the defendant was guilty of gross negligence is a matter for the jury is the law of the case on retrial); Kent v. San Francisco Sav. Union, 130 Cal. 401, 62 Pac. 620; Buck v. City of Eureka, 124 Cal. 61, 77 Am. St. Rep. 149, 56 Pac. 612 (a decision that the plaintiff may recover upon an implied contract when the express contract is void, is law of the case); In re Estate of Lux, 114 Cal. 73, 45 Pac. 1023 (a decision as to the matters to be considered by the probate court in making an allowance to the widow is law of the case); Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174, 27 Pac. 657; Mahan v. Wood, 79 Cal. 258, 21 Pac. 757; Haggin v. Clark, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478; Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065; Chandler v. People's Sav. Bank, 65 Cal. 498, 4 Pac. 502; Pfister v. Wade, 59 Cal. 273; Heinlen v. Martin, 59 Cal. 181; Ferry v. Hammond, 59 Cal. 26; Keller v. Lewis, 56 Cal. 466; Donner v. Palmer, 51 Cal. 629; Megerle v. Ashe, 47 Cal. 632; Russell v. Harris, 44 Cal. 489 (the trial court cannot be held to have erred in following the opinion on the appeal); Lawrence v. Ballou, 37 Cal. 518 (if the rule were otherwise, the end of a case might never be reached); Argenti v. Sawyer, 32 Cal. 414; Estate of Pacheco, 29 Cal. 224; Lucas v. San Francisco, 28 Cal. 591; Sneed v. Osborn, 25 Cal. 619; Kimball v. Semple, 25 Cal. 440;

of the case in which it is rendered, and is thereafter in all subsequent stages of the case binding not only upon the inferior court,[18] but also upon the appellate court if the case is again brought before it.[19] The principle upon which this rule rests is that the judgment is an estoppel binding upon the parties and to be enforced by the court.[20] When the appellate court has decided that from the facts presented in the record certain legal conclusions follow, such legal conclusions must be accepted by the parties upon a retrial, if the same facts are again established, and it is the duty of the lower court not to depart therefrom,[1] and this whether the decision on appeal is or is not erroneous.[2]

The doctrine of the law of the case is confined to points which have been determined as a ground, or one of the grounds, of the judgment,[3] or which have been considered

Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Leese v. Clark, 20 Cal. 387; Raun v. Reynolds, 15 Cal. 459; Davidson v. Dallas, 15 Cal. 75; Soule v. Dawes, 14 Cal. 247; Gunter v. Laffan, 7 Cal. 588; Ruiz v. Norton, 4 Cal. 359, 60 Am. Dec. 618; Prouty v. Adams, 7 Cal. Unrep. 241, 82 Pac. 1081; Fox v. Hale & Norcross Silver Min. Co., 5 Cal. Unrep. 980, 53 Pac. 32, 169; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516 (per Harrison, J.); Cleary v. Folger, 4 Cal. Unrep. 76, 33 Pac. 877; Castagnino v. Balletta, 3 Cal. Unrep. 107, 21 Pac. 1097; San Francisco v. Spring Valley Water Works, 1 Cal. Unrep. 783; Dabovich v. Emeric, 1 Cal. Unrep. 90; Ransome-Crummey Co. v. Coulter, 33 Cal. App. Dec. 619, 194 Pac. 1051; Beckett v. Stuart, 40 Cal. App. 108, 180 Pac. 348 (holding decision of trial court not in conflict with law of the case); San Joaquin & R. R. C. & I. Co. v. Stevenson, 26 Cal. App. 274, 147 Pac. 254 (decision as to use of water); Lantz v. Fishburn, 17 Cal. App. 583, 120 Pac. 1068; Muller v. Swanton, 17 Cal. App. 232, 119 Pac. 200; Curtin v. Ingle, 11 Cal. App. 340, 104 Pac. 1003; Estate of Jessup, 2 Cof. Prob. Dec. 476.

18. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000.

19. See supra, §§ 555–569, inclusive.

20. Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516, citing Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876.

1. Cleary v. Folger, 4 Cal. Unrep. 76, 33 Pac. 877.

2. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800; Heinlen v. Martin, 59 Cal. 181; Lawrence v. Ballou, 37 Cal. 518; Soule v. Dawes, 14 Cal. 247; Gunter v. Laffan, 7 Cal. 588.

3. Miller v. Kraus, 51 Cal. Dec. 154, 155 Pac. 838; People v. Skidmore, 27 Cal. 287.

and passed upon with a view to the new trial for the purposes of which they were important.[4] But it does not extend to a mere opinion of the judges as to points which can have no effect upon the case in any stage of it.[5] Neither does it extend to portions of the opinion not concurred in by the requisite number of justices.[6] But statements in a main opinion are not deprived of their force by statements in an order denying a rehearing as to the grounds upon which the reversal rests, when the original opinion is not modified.[7]

§ 621. Same or Different Facts.—The doctrine of the law of the case does not prevent the parties from proving an entirely different state of facts upon the retrial.[8] The former judgment and opinion of an appellate court do not constitute an adjudication of the rights of the parties controlling the subsequent proceedings in a cause to the same extent as a final judgment in another action would be an adjudication, so that the parties are thereby estopped as to their rights to the things determined, although they may discover or be able to present to the court below new facts or evidence, which may affect their rights or make a case different from that which was presented on the former appeal. They do not limit the power of the superior court, in its discretion, to permit further amendments of the pleadings, by either party, presenting additional facts which may entitle such party to relief which the facts originally alleged did not warrant.[9] As the principle upon which the doctrine of "the law of the

4. Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548.

5. State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118.

6. Turner v. Fidelity Loan Concern, 2 Cal. App. 123, 141, 83 Pac. 62, 70.

7. Lantz v. Fishburn, 17 Cal. App. 583, 120 Pac. 1068.

8. Ryan v. Tomlinson, 39 Cal. 639; Cleary v. Folger, 4 Cal. Unrep. 76, 33 Pac. 877.

9. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800.

case'' rests is that of estoppel by judgment, it follows that it is only the matters which are actually adjudged or determined as the basis of the judgment of the court of appeal that can be considered as the law of the case, and binding upon the parties in its subsequent stages. When the judgment or determination is made upon a certain state of facts, it ceases to be of binding force if the facts presented at the retrial are essentially different.[10] The rule can be invoked only when the fact reappears in the same circumstances in which it was originally presented.[11] To prevent the application of the doctrine, however, the additional allegations in the pleadings or the additional evidence must materially change the issues or the rights of the parties.[12]

§ 622. Decision upon Questions of Law.—The doctrine of the ''law of the case,'' generally speaking, has reference only to the principles of law announced by the court as applicable to a retrial of identical facts. It does not embrace the facts themselves.[13] As was said in an early

10. Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920; Brett v. S. H. Frank & Co., 162 Cal. 735, 124 Pac. 437; Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800; Goodsell v. Ashworth, 115 Cal. 222, 46 Pac. 1066; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Faulkner v. Hendy, 103 Cal. 15, 23, 36 Pac. 1021; Gould v. Stafford, 101 Cal. 32, 35 Pac. 429 (a decision as to the admissibility of certain evidence is not binding on the trial court after a material amendment of the pleadings); Mitchell v. Davis, 23 Cal. 381; Luco v. De Toro, 4 Cal. Unrep. 291, 34 Pac. 516 (per Harrison, J.); Cleary v. Folger, 4 Cal. Unrep. 76, 33 Pac. 877; Castagnino v. Balletta, 3 Cal. Unrep. 107, 21 Pac. 1097 (and when the pleadings are amended in material particulars, the decision on appeal is not law of the case); Robben v. Benson, 29 Cal. App. Dec. 791, 185 Pac. 200; Beckett v. Stuart, 40 Cal. App. 108, 180 Pac. 348; Estate of Jessup, 2 Cof. Prob. Dec. 476.

11. Nieto v. Carpenter, 21 Cal. 455; Estate of Jessup, 2 Cof. Prob. Dec. 476.

12. Brett v. S. H. Frank & Co., 162 Cal. 735, 124 Pac. 437.

13. Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920; Allen v. Bryant, 155 Cal. 256, 100 Pac. 704; Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200 (a decision that islands in a stream belong to the state is the law of the case, but the question whether the particular land in controversy was an island, or was formed by accretions from the main-

case: "It is upon questions of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact."[14] This results from the relative functions of the trial court and the appellate court, the former alone being authorized to determine questions of fact, and the latter being limited to determining questions of law. The appellate court cannot itself make a finding of fact when the evidence is all before it, or find the ultimate fact from other probative facts unless such ultimate fact follows as a conclusion of law therefrom.[15]

While a finding as to whether a contract was made between the parties is not a decision of a question of law and binding upon the trial court,[16] the construction of written instruments,[17] and the determination of the character and sufficiency of bonds,[18] or of the sufficiency of pleadings to state a cause of action or defense,[19] are decisions upon questions of law and are binding upon a trial court.

land, is as fully at issue at the second as at the first); Robinson v. Thornton, 114 Cal. 275, 46 Pac. 79; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Sneed v. Osborn, 25 Cal. 619 (on rehearing); Globe Grain & Milling Co. v. Drenth, 41 Cal. App. 604, 183 Pac. 285; Estate of Jessup, 2 Cof. Prob. Dec. 478.

If an appellate court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the trial court; Sneed v. Osborn, 25 Cal. 619 (on rehearing); Cleary v. Folger, 4 Cal. Unrep. 76, 33 Pac. 877.

14. Sneed v. Osborn, 25 Cal. 619 (per Rhodes, J., on rehearing); Globe Grain & Mill Co. v. Drenth, 41 Cal. App. 604, 183 Pac. 285.

15. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000.

16. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000.

17. Estate of Carothers, 168 Cal. 691, 144 Pac. 957 (construction of a will); Gallatin v. Corning Irr. Co., 163 Cal. 405, 422, Ann. Cas. 1914A, 74, 126 Pac. 864, 870 (construction of judgment); Pico v. Cuyas, 48 Cal. 639; Kimball v. Semple, 25 Cal. 440 (construction of deed).

18. Lantz v. Fishburn, 17 Cal. App. 583, 120 Pac. 1068 (street improvement bonds); People's Lumber Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556 (building contractor's bond).

19. Kinard v. Jordan, 167 Cal. 333, 139 Pac. 797; Pfister v. Wade, 59 Cal. 273; Ferry v. Hammond, 59 Cal. 26; Prouty v. Adams, 7 Cal. Unrep. 241, 82 Pac. 1081 (holding that an order directing the striking from an answer a defense at

Evidence.—The doctrine of the law of the case has a very narrow application to evidence.[20] While a decision as to the admission of certain evidence would undoubtedly be binding upon the trial court if there is no change in the pleadings, it is not binding upon a subsequent trial if the pleadings are materially amended.[1] A decision that the evidence in a case is insufficient as a matter of law to go to the jury is binding on the trial court on retrial if the evidence presented is substantially the same as that on the first trial. A decision that the facts show that the plaintiff is guilty of contributory negligence as a matter of law is binding upon the trial court when the evidence on the retrial is substantially the same.[2]

§ 623. Sufficiency of Evidence to Support Findings.—It frequently happens that the sufficiency of the evidence to justify a decision depends upon the competency of the evidence, or the effect of an act or admission, or the construction to be given to a written instrument. If in such case the appellate court holds that the evidence was incompetent, or received an erroneous construction by the trial court, and that for this reason the evidence was insufficient to justify the decision, such ruling of the appellate court becomes the law of the case, since the sufficiency of the evidence depends upon the question of law which is thus decided.[3] But when the fact which is to be de-

variance with the defendant's contract was binding upon the trial court, and it could not allow the filing of an amended answer setting up the same defense and omitting all reference to the contract).

A reversal of an order sustaining a general demurrer to a complaint is law of the case as to the sufficiency of the complaint as against all grounds specified in the demurrer, notwithstanding the court in its opinion confines its discussion to one ground. Neale v. Morrow, 163 Cal. 445, 125 Pac. 1053.

20. Allen v. Bryant, 155 Cal. 256, 100 Pac. 704.

1. Gould v. Stafford, 101 Cal. 32, 35 Pac. 429.

2. Brett v. S. H. Frank & Co., 162 Cal. 735, 124 Pac. 437 (contributory negligence of employee); Arnold v. San Francisco-Oakland etc. Rys., 41 Cal. App. 483, 182 Pac. 805.

3. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000. See Foley v. North-

cided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision.[4] If the appellate court decides that the evidence is sufficient to support a finding, the trial court is authorized to make the same finding upon the same evidence.[5] But it is not precluded from making a contrary finding if there is evidence reasonably tending to support the opposite conclusion.[6] So, also, a decision that

ern California Power Co., 165 Cal. 103, 130 Pac. 1083 (holding "this case does not come within that very limited class in which the doctrine is applied to matters of evidence as distinguished from rulings of law").

4. Allen v. Bryant, 155 Cal. 256, 100 Pac. 704; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000 (per Harrison, J., stating that the "evidence" from which a fact is to be determined does not consist merely of the language used by the witnesses. It includes also the appearance and demeanor of the witnesses on the stand, the credit to which they are entitled, the inferences of fact which may be drawn from other evidence, and the harmony of one portion of the testimony with the other. The consideration of these elements is peculiarly within the province of the trial court, and whenever the decision of a fact depends thereon in whole or in part, the appellate court cannot prescribe the mode in which the decision shall be made, or take from the trial court the power of determining the sufficiency of the evidence to establish a fact); Koyer v. Willmon, 12 Cal. App. 87, 106 Pac. 599; Kramm v. Stockton Electric R. R. Co., 10 Cal. App. 271, 101 Pac. 914. See Foley v. Northern California Power Co., 165 Cal. 103, 130 Pac. 1183 (holding that a conclusion of the jury as to contributory negligence in pursuance of erroneous instructions is not the law of the case on second trial, even though the evidence is the same).

5. Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078.

6. Robinson v. Thornton, 114 Cal. 275, 46 Pac. 79 (in which the appellate court on the first appeal decided that the evidence was sufficient to sustain a finding of adverse possession, and the trial court on retrial, the evidence being the same, instructed the jury to find for the defendant as to adverse possession. This was held to be error, as adverse possession is a question of fact and the decision on appeal did not preclude the jury from finding

the evidence is insufficient to support a finding does not preclude a trial court from making the same finding upon the same evidence.[7] The appellate court might again reverse the decision, but before doing so, it would consider whether it might not be that that portion of the evidence which could not be reproduced in the record—the demeanor of witnesses, as well as their credibility, the weight to be given to contradictory testimony, the inferences to be drawn from different portions of the evidence—was such as to support the conclusion of the trial court.[8] Whether the evidence in a case tends to prove a fact is a question of law which arises when the admissibility of such evidence is questioned, or when it is relied upon for the purpose of establishing a controverted fact, and a decision of the appellate court that such evidence does or does not tend to establish the fact is binding on the trial court.[9] But whether the evidence is sufficient to establish the fact is a question of fact to be determined by the trial court, and a declaration by an appellate court that the fact is established is not binding on the trial court.[10] If, in such case, the appellate court, in the opinion which it renders, assumes that the evidence sustains any fact, it is only the opinion of the court, and not a finding of that fact.[11] So, too, whether a particular inference can under any circumstances be drawn from certain evidence is a question of law; but whether the infer-

differently on a retrial on the same evidence); Luco v. De Toro, 4 Cal. Unrep. 291, 293, 34 Pac. 516. But see Jaffe v. Skae, 48 Cal. 540, holding that in the absence of a substantial conflict in the evidence, a decision that the legal effect of the evidence is to establish the case of one of the parties is binding upon the trial court.

7. Allen v. Bryant, 155 Cal. 256, 100 Pac. 704 (where the appellant mistakenly sought to extend the doctrine of the law of the case). See supra, this section.

8. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000 (per Harrison, J.)

9. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Lassing v. Paige, 56 Cal. 139.

10. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Fox v. Hale & Norcross Silver Mining Co., 5 Cal. Unrep. 980, 53 Pac. 32.

11. Allen v. Bryant, 155 Cal. 256, 100 Pac. 704; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000.

ence in any particular case be drawn from the evidence is a question of fact.[12]

Decision upon motion for new trial.—A decision that a trial court did not abuse its discretion in granting a new trial on the ground that the verdict was not sustained by the evidence does not settle the law of the case that the defendant is entitled on the new trial to a nonsuit when the plaintiff closes his case. The language of the appellate court applies merely to the action of the court on the motion for new trial, and is quite inappropriate as an expression of opinion as to the merits of a motion for a nonsuit.[13]

§ 624. Application of Doctrine to Subsequent Suits.—As a general rule, the doctrine of the law of the case is adhered to in the single case where it arises, and is not carried into other cases as a precedent.[14] However, it seems that the doctrine applies where the action in which the ruling was made is subsequently dismissed without prejudice and a new action is begun upon the same cause.[15] Thus, as against a contention that a decision on a former appeal should not be considered the law of the case for the reason that after the going down of the remittitur the action was dismissed and no judgment was entered which could be pleaded in bar or given in evidence, it has been said:

"A similar question was spoken of by Mr. Justice Field in his concurring opinion in the case of Knight v. United Land Association, lately decided by the supreme court of the United States. Referring to the case of Tripp v.

12. Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; Elizalde v. Murphy, 11 Cal. App. 32, 103 Pac. 904 (inference of negligence).

13. Moore v. Murdock, 26 Cal. 514.

14. Allen v. Bryant, 155 Cal. 256, 100 Pac. 256.

15. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049 (assuming but not deciding that the doctrine is applicable to the case stated in the text); Reed v. Ring, 93 Cal. 96, 28 Pac. 851.

Spring, 5 Sawy. 209, 212, Fed. Cas. No. 14,180, where at the close of the trial an oral opinion was rendered and subsequently written out, the case in the meantime, however, having been dismissed, the learned justice said: 'The opinion of the court, pronounced at the close of the trial, and subsequently written out, was, notwithstanding the dismissal, as much authority on the question of law presented as though a formal judgment had been entered, although the judgment ordered, because not entered on account of the dismissal, could not be pleaded in bar of a future action.' "[16]

Elsewhere, it has been held that the doctrine applied to a case where, after a decision on the defendant's appeal, reversing a judgment of ejectment because of the insufficiency of a certain power of attorney to authorize the conveyance on which the plaintiff relied, the defendant brought a new suit in equity to enjoin the plaintiff from prosecuting his action at law and making further claims under the void conveyance. The equity suit was held to be but a continuance of the law case, as it was between the same parties, concerning the same matter, and upon the same facts, and involved the construction of the same instruments. Therefore, the decision in the law action was held binding in the equity suit.[17]

Powers and Duties of Trial Court.

§ 625. Compliance With Remittitur—Noncompliance.—The powers of a trial court after a cause has been remanded to it by an appellate court are determined by the directions in the remittitur. It is the duty of the trial court to comply with such directions,[18] and proceedings contrary thereto must be treated as null and void.[19] A trial

16. Reed v. Ring, 93 Cal. 96, 28 Pac. 851 (per Belcher, C.).

17. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049, citing Portland Trust Co. v. Coulter, 23 Or. 131, 31 Pac. 280.

18. Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176; Keller v. Lewis, 56 Cal. 466.

19. Cowdery v. London, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Chafoin v. Rich, 92 Cal. 471,

court cannot refuse obedience to a remittitur because of any supposed errors in the judgment of the appellate court,[20] for as just pointed out, the decision on appeal, whether right or wrong, is binding as the law of the case.[1] On remand for trial the cause is to be tried in pursuance of the principles of law declared in the opinion,[2] and no error can be alleged in the action of the trial court if the new trial is had in accordance with the decision of the appellate court.[3] When a cause is remanded, not for retrial, but to give effect to the decision on appeal, the trial court can take no further proceedings except such as are necessary to give effect to the judgment of the court.[4] The general direction to the lower court to proceed in accordance with the principles announced in an opinion is a mere formality, which, of itself, neither gives authority nor limits the power of the court, as such duty would devolve upon that court without such direction. Therefore, an order for a decree in accordance with the opinion of the appellate court does not prevent the trial court from taking such a course of proceedings as will give full effect to the decision. If certain questions are left open, the trial court may pass upon them.[5]

Compliance with mandate of federal court.—The action of the supreme court of California upon the presentation of a writ of mandate from the supreme court of United States is limited to the directions found in the writ, and where the mandate contains no reference to the affirmance of the judgment theretofore rendered, it is useless for the court to reaffirm its order of judgment.[6]

28 Pac. 488; Heinlen v. Martin, 59 Cal. 181; Mulford v. Estudillo, 32 Cal. 131; Argenti v. San Francisco, 30 Cal. 458; Chapman v. Hughes, 3 Cal. App. 622, 86 Pac. 908.

20. In re Heydenfeldt, 117 Cal. 551, 49 Pac. 713.

1. See supra, § 620.

2. Davidson v. Dallas, 15 Cal. 75, (explaining Stearns v. Aguirre, 7 Cal. 443, and holding that the directions of the opinion become a portion of the judgment). See supra, § 620.

3. Leese v. Clark, 20 Cal. 387.

4. Soule v. Dawes, 14 Cal. 247.

5. Raun v. Reynolds, 15 Cal. 459.

6. Estate of Blythe, 118 Cal. 347, 50 Pac. 545.

Remedy for noncompliance.—Where the circumstances warrant, a compliance with a remittitur may be enforced by mandamus,[7] certiorari,[8] writ of prohibition,[9] or by contempt proceedings.[10] In order to determine whether or not the lower court entered the judgment ordered by the appellate court, the party aggrieved may appeal from a judgment entered pursuant to the directions of the court of review.[11] Upon such appeal the only question for review is whether the judgment entered conforms to the direction of the appellate court. Whether the former judgment was warranted by law cannot be considered.[12]

§ 626. Allowing Amendments and Additional Pleadings.—After reversal and remand for new trial, the parties in the court below have the same rights which they originally had.[13] The trial court has full power to allow amendments to the pleadings,[14] independent of any direction of the appellate court.[15] And the party may apply for leave to amend in the same manner as when a demurrer to his pleading is sustained.[16] It would require,

7. Dixon v. Risley, 114 Cal. 204, 46 Pac. 5; United States v. Fossatt, 62 U. S. (21 How.) 445, 16 L. Ed. 186. See MANDAMUS.

8. Clary v. Hoagland, 5 Cal. 476 (when, notwithstanding a reversal of a judgment for restitution the trial court issues a mandamus commanding the clerk to issue a writ of restitution pursuant to its original judgment, a writ of certiorari may properly be issued).

9. Kirby v. Superior Court, 68 Cal. 606, 10 Pac. 119.

10. In re Mahon, 71 Cal. 586, 12 Pac. 868 (holding judge not guilty of contempt in the particular case).

11. Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855 (quaere, whether an attempted appeal from a judgment entered pursuant to a mandate of the appellate court is not a contempt of court). See supra, § 42.

12. Fox v. Hale & Norcross S. M. Co., 112 Cal. 568, 44 Pac. 1022. See supra, § 555, as to law of case.

13. See supra, § 590.

14. San Jose Safe Deposit v. Bank of Madera, 156 Cal. 38, 103 Pac. 255; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Pierce v. Jackson, 21 Cal. 636 (on petition for modification of judgment); Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849.

15. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800 (per Shaw, J.); Pierce v. Jackson, 21 Cal. 636.

16. Phelan v. Supervisors, 9 Cal. 15.

at least, an express decision by the appellate court to the effect that an amendment otherwise proper should not be made in the court below to take from it its ordinary powers to allow such amendments as appear to be in furtherance of justice, and necessary or proper to enable the parties to present their whole case on the merits.[17] A direction by the appellate court to allow certain amendments makes it obligatory upon the trial court to allow them, in the absence of any new facts which might justify a refusal to do so.[18] But such a direction does not preclude the court from allowing other amendments.[19] It may permit further amendments presenting additional facts entitling the parties to relief not warranted by the original pleadings,[20] but it may deny an application which changes an admission under oath to a denial.[1]

After affirmance of a judgment the trial court cannot vacate the judgment, permit the plaintiff to amend his complaint and proceed with the trial of the case. The litigation is ended,[2] and the only amendments allowed are for clerical misprisions when the means for making the amendments and the right to make them are furnished by the record itself.[3]

§ 627. Entry, Vacation and Modification of Judgment. When a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter

17. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800.

18. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800; Dixon v. Risley, 114 Cal. 204, 46 Pac. 5 (the court cannot impose terms as a condition to permission to file the amendments directed). When the order to allow amendments is general, the party may file an amended pleading without motion therefor or leave given by the trial court; Pottkamp v. Buss, 5 Cal. Unrep. 462, 46 Pac. 169.

19. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800.

20. Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700.

1. Spanagel v. Reay, 47 Cal. 608.

2. Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855; Kirley v. Superior Court, 68 Cal. 604, 10 Pac. 119. See infra, § 629, entertaining motion for new trial.

3. Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119.

a judgment in conformity with the order of the appellate court.[4] That order is decisive of the character of the judgment to which the appellant is entitled, and the superior court has no authority to modify, change or disregard it in any respect,[5] not even if the judgment directed to be entered fails to give a party what was justly or legally his due.[6] It cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings,[7] and retry the case,[8] and if it should do so, the judgment rendered thereon would be void.[9] A judgment otherwise in pursuance of the mandate of an appellate court is not, however, vitiated by the addition of a clause that the party is entitled to appropriate process to enforce the judgment so given.[10]

Mode of modifying judgment.—When upon an appeal a judgment is ordered to be modified without prescribing the mode of modifying it, the mode is in the discretion of the court below. It is proper for it to modify the judgment already rendered,[11] or to vacate the former judg-

4. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Vance v. Smith, 132 Cal. 510, 64 Pac. 1078; Heinlen v. Martin, 59 Cal. 181; Meyer v. Kohn, 33 Cal. 484; Leese v. Clark, 28 Cal. 26. See Heilbron v. 76 Land & Water Co., 96 Cal. 7, 30 Pac. 80; Donner v. Palmer, 45 Cal. 180 (holding the judgment was in conformity with the remittitur). See Will v. Sinkwitz, 41 Cal. 588, as to effect of reversal of judgment of district court rendered on appeal from the justice's court, with directions to vacate the judgment of the latter court.

5. Weaver v. San Francisco, 146 Cal. 728, 81 Pac. 119; Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Argenti v. Sawyer, 32 Cal. 414.

6. Argenti v. Sawyer, 32 Cal. 414.

7. Keller v. Lewis, 56 Cal. 466.

8. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Chafoin v. Rich, 92 Cal. 471, 28 Pac. 488; Soule v. Dawes, 14 Cal. 247.

9. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Chafoin v. Rich, 92 Cal. 471, 28 Pac. 488; Heinlen v. Martin, 59 Cal. 181.

10. White v. Wise, 7 Cal. Unrep. 212, 81 Pac. 664.

11. Bemmerly v. Woodard, 136 Cal. 326, 68 Pac. 1017. See Welch v. Sullivan, 1 Labatt Dist. Ct. 356, holding that the proper practice where the entry of a particular judgment is directed is for the clerk to make the entry, but when the appellate court indicates the

ment and enter a new judgment covering the whole ground.[12] But the trial court cannot of course change the original judgment in any particular other than as directed.

Time of entry.—When the mandate directs the entry of judgment on some issues and a new trial of the remainder, without specifying when the judgment shall be entered, the presumption is that it was intended that the judgment should be entered at the same time as and should constitute a part of the final judgment to be rendered on all the issues. This is in accord with the general rule that there can be but one final judgment in an ordinary civil action.[13]

Amendment or vacation of judgment entered.—While a trial court cannot vacate a judgment docketed in conformity with the directions of the appellate court,[14] it has authority to make a judgment entered on its records conform to the directions of the trial court, where the cause is remanded for further proceedings in accordance with the opinion of the appellate court. When the direction is not specific, but leaves room for the exercise of any discretion in the court below, the court has a judicial power to determine whether an order as entered does or does not conform to the direction of the appellate court.[15] This power has been impliedly recognized also where there is a simple reversal.[16]

After affirmance.—After affirmance of a judgment, the trial court cannot vacate or modify it or render a new

error and directs a modification in accord with its opinion, the entry is a judicial act to be made by the trial court.

12. Downing v. Rademacher, 138 Cal. 325, 71 Pac. 343.

13. Fox v. Hale & Norcross S. M. Co., 112 Cal. 568, 44 Pac. 1022.

14. McMillan v. Richards, 12 Cal. 467 (holding that the trial court cannot vacate a judgment entered by the clerk pursuant to the mandate of the supreme court).

15. In re Mahon, 71 Cal. 586, 12 Pac. 868; Chapman v. Hughes, 3 Cal. App. 622, 86 Pac. 908.

16. Chapman v. Hughes, 3 Cal. App. 622, 86 Pac. 908.

judgment where all the questions in the motion might have been brought before the court of review,[17] though it may correct a clerical error as to amount,[18] or vacate its judgment for matters not noticeable upon and transpiring since the disposition of the appeal.[19]

New Trial.

§ 628. Effect of Decision as Granting New Trial.—While an appellate court has authority to limit the trial after remand to one or more issues,[20] a remand for new trial in general terms without limitations must ordinarily be understood as a new trial of the whole case,[1] even when such an order is made because of a failure to find upon some material issue.[2] Of course, when all the parties to a suit are not parties to an appeal, a reversal and order for new trial affects only the parties before the appellate court.[3]

Where new trial is not specifically directed.—Upon an appeal from a judgment, an order, "Judgment reversed and cause remanded," has the effect of remanding the cause to the lower court for a new trial of all the issues made by the pleadings,[4] unless there is something in the opin-

17. Parker v. Bernal, 68 Cal. 122, 8 Pac. 696; Mulford v. Estudillo, 32 Cal. 131 (a judgment so rendered is void).

18. Corson v. McDonald, 3 Cal. App. 412, 85 Pac. 861.

19. In re Wharton, 130 Cal. 486, 62 Pac. 741 (where in refusing to set aside its judgment affirming an order disbarring an attorney, after remittitur issued, the court said that if any matters transpired since its entry which would authorize or justify a modification, a motion therefor should be presented to the tribunal which has control of the records upon such notice as to it may seem suitable).

20. See supra, § 589.

1. Hidden v. Jordan, 28 Cal. 301; Jacobs v. Walker, 3 Cal. Unrep. 865, 33 Pac. 91.

2. Jacobs v. Walker, 3 Cal. Unrep. 865, 33 Pac. 91 (explaining Chandler v. People's Savings Bank, 61 Cal. 401, 65 Cal. 498, 4 Pac. 582, 11 Pac. 791, 14 Pac. 864, 73 Pac. 317).

3. Little v. Superior Court, 74 Cal. 219, 15 Pac. 731. See supra, §§ 570, 586.

4. Estate of Pusey, 177 Cal. 367, 170 Pac. 846; Stein v. Leeman, 161

ion of the court restricting the operation of the words "reversed" and "remanded."[5]

The effect of a reversal in general terms is to award a new trial of the case where the ground for reversal is errors in the admission or exclusion of evidence,[6] or that the findings were not justified by the evidence.[7] A reversal on the ground that the judgment is not supported by the findings does not necessarily imply that any judgment ought to be rendered on the findings, for it may be that there is no finding at all upon a material fact, in which event no judgment could properly be rendered.[8] On a reversal for failure to find upon all the issues, the lower court may amend its findings without a new trial if it can do so upon the evidence already taken; otherwise it may proceed to hear evidence upon the point, after due notice to the parties.[9] But in case of a reversal where the judgment was entered before findings had been signed, it has been held that the trial court cannot, on the strength of the former trial, order findings to be prepared

Cal. 502, 119 Pac. 663; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Falkner v. Hendy, 107 Cal. 49, 54, 40 Pac. 21, 386; Myers v. McDonald, 68 Cal. 162, 8 Pac. 809; Steen v. Hendy, 107 Cal. 49, 40 Pac. 386; Ryan v. Tomlinson, 39 Cal. 639 (unless it is apparent from the opinion of the court that the adjudication is intended to be a final disposition of the cause, the effect of a reversal is only to set aside the judgment that a new trial may be had); Haynes v. Meeks, 1 Cal. Unrep. 79; In re Kling, 32 Cal. App. Dec. 991, 192 Pac. 453; Jarvis v. Frey, 31 Cal. App. Dec. 875, 189 Pac. 795; Rossi v. Caire, 39 Cal. App. 776, 180 Pac. 58; Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849. See Meiggs v. Scannell, 1 Labatt Dist. Ct. 233, distinguishing between cases tried by a jury and those tried by the court.

5. Stein v. Leeman, 161 Cal. 502, 119 Pac. 663; Myers v. McDonald, 68 Cal. 162, 8 Pac. 809.

6. Davis v. Le Mesnager, 155 Cal. 519, 101 Pac. 910 (holding it error to render judgment upon the prior judgment-roll and opinion of the supreme court).

7. Chandler v. People's Savings Bank, 65 Cal. 498, 4 Pac. 502; Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849. See supra, § 588.

8. Heidt v. Minor, 113 Cal. 385, 45 Pac. 700.

9. Bosquett v. Crane, 51 Cal. 505.

and a judgment entered in conformity therewith. It should try the case anew.[10]

On appeal from part of judgment.—When an appeal is taken from an independent part of a judgment, a mandate consisting simply of the words, "The judgment is reversed," is to be construed to refer only to the part of the judgment appealed from and to reverse that part only without affecting the remainder. This results from the fact that the court is without authority on such an appeal to consider the remainder of the judgment.[11]

Upon appeal from new trial orders.—The affirmance of an order granting a new trial,[12] or reversal of an order denying a new trial,[13] has the effect of granting a new trial as effectually as if the court below had in words made an order granting a new trial.

A reversal of an order striking from the files a notice of intention to move for new trial remands the proceedings for a new trial.[14]

10. Myers v. McDonald, 68 Cal. 162, 8 Pac. 809.

11. Whalen v. Smith, 163 Cal. 360, 125 Pac. 904.

12. Miller & Lux v. Enterprise Canal & L. Co., 169 Cal. 415, 147 Pac. 567 (the affirmance of an order granting a new trial has the effect of setting the entire case at large, and gives the lower court authority to try the whole case anew, even though upon an appeal from the judgment taken by one of the plaintiffs, the court remanded the cause with directions to enter judgment in favor of the appellant, and the entry of such judgment in pursuance of the mandate of the supreme court, is made subsequent in point of time to the order granting the new trial).

13. Eades v. Trowbridge, 143 Cal. 25, 76 Pac. 714; Fox v. Hale & Norcross Silver Min. Co., 5 Cal. Unrep. 980, 53 Pac. 32 (a reversal of an order refusing a new trial as to an issue itself grants a new trial on that issue); Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849 (where the motion was made upon the ground that the findings are not justified by the evidence).

Even when the order remands the cause for further proceedings in accordance with the opinion, its effect is to place the cause in the same situation as to procedure to be followed as though a new trial had been expressly directed, provided there is no contrary indication in the opinion. Irwin v. Towne, 43 Cal. 23.

14. Bond v. United Railroads, 169 Cal. 618, 147 Pac. 465.

§ 629. Entertaining Motion for New Trial After Remand.—A motion for new trial is a proceeding independent of judgment and may be granted even after a judgment has been affirmed on appeal, when based upon errors of law not considered or passed upon by the appellate court in affirming the judgment, or upon the ground of newly discovered evidence.[15] But it cannot be granted when the court in order to grant it contravenes what has been adjudicated by the previous decision.[16] When there is a direct appeal from a judgment and an appeal from an order dismissing a motion for new trial, and the former is affirmed and the latter reversed, the affirmance does not preclude the trial court from setting aside the verdict or findings and the judgment based thereon if it should decide that the motion should be granted.[17]

Time.—When an appellate court directs the entry of a judgment against the respondent, the time in which to move for a new trial runs from the notice of entry of the second judgment pursuant to the remittitur of the appellate court, and not from the entry of the original judgment. The original judgment being in his favor, the respondent is not required to move for a new trial until there is a judgment affecting him injuriously.[18]

15. Carter v. Lothian, 133 Cal. 451, 65 Pac. 962; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; McDonald v. McConkey, 57 Cal. 325.

16. Sharon v. Sharon, 79 Cal. 633, 691, 22 Pac. 26, 131 (per Thornton, J., concurring).

17. McDonald v. McConkey, 57 Cal. 325.

18. Bond v. United Railroads, 169 Cal. 273, 146 Pac. 688 (following Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876, and overruling Brady v. Feisel, 54 Cal. 180). See Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69. The original opinion reported in 6 Cal. Unrep. 134, 54 Pac. 826, overruled or criticised the case of Brady v. Feisel, but on rehearing the court declined to pass upon the question. See Fox v. Hale & Norcross Silver Min. Co., 5 Cal. Unrep. 980, 53 Pac. 32, holding a reversal and remanding of a cause for a new trial of a single issue is in effect an affirmance of the findings and conclusions of the lower court in all other respects, and the trial court

§ 630. **Scope of and Proceedings on New Trial.**—If the judgment of the appellate court orders a new trial, the clerk of the superior court, when the remittitur is issued and filed, will proceed to place the cause on the calendar.[19] When a cause is to be tried anew after an appeal, the parties are in the same position, and the cause is to be retried as if it had never been tried,[20] with the exception that the former opinion of the appellate court must be followed, so far as applicable, in the new trial.[1] The parties may make such proper amendments to the pleadings as the court might allow,[2] and are free to introduce any and all competent evidence.[3] Although where the judgment is reversed because of the insufficiency of the evidence to support a particular finding, the court may confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the testimony already before it, or adopt the facts already found upon such testimony.[4] The trial court may direct a verdict where the facts proved upon the subsequent trial are not materially different from those reviewed by the appellate court and held insufficient to warrant a recovery.[5] And on reversal of a judgment of dismissal, the motion for dismissal and any demurrer

has no power or discretion to reopen or disturb its findings or judgment in such respects.

19. McMann v. Superior Court, 74 Cal. 106 (holding that no action is required on the part of the superior court to authorize the entries on the coming down of the remittitur, citing and approving McMillan v. Richards, 12 Cal. 467, and Marysville v. Buchanan, 3 Cal. 212).

20. Estate of Pusey, 177 Cal. 367, 170 Pac. 846; Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200; Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065; Hess v. Winder, 34 Cal. 270; Castagnino v. Balletta, 3 Cal. Unrep. 107, 21 Pac. 1097; Matter of Kling, 32 Cal. App. Dec. 991, 192 Pac. 453.

1. See supra, § 620.

2. See supra, § 626.

3. Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200; Riley v. Loma Vista Ranch Co., 5 Cal. App. 25, 89 Pac. 849. See supra, § 621, as to right to prove different state of facts.

4. Chandler v. People's Sav. Bank, 73 Cal. 317, 11 Pac. 791, 14 Pac. 864; Gunter v. Laffan, 7 Cal. 588.

5. Arnold v. San Francisco-Oakland Terminal Rys., 41 Cal. App. 483, 182 Pac. 805.

interposed are before the court for its consideration in the same manner and to the same extent as they were before the court's former action thereon, or as if they had been presented to the court for the first time. It is within the court's discretion to consider the demurrer before passing upon the motion.[6] The trial court may vacate writs which have been issued to enforce the original judgment, and applications for such relief should be made in that court rather than in the appellate court.[7] If the plaintiff was entitled to an injunction before the former trial and an injunction was ordered, he is entitled to retain that right when the cause is remanded for new trial.[8]

Stay.—Where a retrial of an action after reversal without the payment of costs upon appeal would be oppressive and vexatious, the superior court has discretionary power to stay the retrial until payment of such costs. But mere nonpayment of costs, not coupled with any other circumstances, is not cause for a stay, and the discretion of the court should be exercised cautiously, ex aequo et bono, employing or declining the power as the right and justice of the particular case may seem to require.[9]

Restitution.

§ 631. In General.—A trial court has power to make restitution of property and rights lost by an erroneous judgment or order, notwithstanding the fact that similar power has been conferred upon the appellate courts.[10] This is in accord with the rule that the granting of power to one court to do an act is not in exclusion of the right

6. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

7. Thompson v. Thornton, 41 Cal. 626.

8. Hess v. Winder, 34 Cal. 270. See Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327 (quaere).

9. Weile v. Sturtevant, 176 Cal. 767, 169 Pac. 685.

10. See supra, § 592.

of another court possessing the power from acting in respect to the particular matter.[11]

The rule formerly prevailed that whenever a sale was made under an erroneous decree or judgment, which was afterwards reversed—the court rendering the judgment having jurisdiction of the person and subject matter—the purchaser acquired good title notwithstanding the reversal. It was enough, it was said, for the purchaser to know that the court had jurisdiction and exercised it, and that the judgment on the faith of which he purchased was made and authorized the sale. The former owner was then turned over to an action of damages to make good the loss of his property.[12] That doctrine is now so far modified that, if the plaintiff in the judgment be himself the purchaser, the former owner, after reversal, may at his election either have the sale set aside and be restored to possession, or have his action for damages.[13] The reason for allowing him the right to have the sale set aside is that his claim to the property depends upon the judgment and is destroyed by its reversal.[14]

To be within the protection of the rule and to retain the property purchased, the purchaser must claim to be a bona fide purchaser. To constitute this character, he must show that he has paid the purchase money, and that he is the purchaser of the legal title, not of a mere equity. If he has not received a sheriff's deed, a purchaser at

11. Johnson v. Lamping, 34 Cal. 293; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459. See COURTS.

12. Di Nola v. Allison, 143 Cal. 106, 65 L. R. A. 419, 76 Pac. 976 (the rule is unquestioned that the title of a stranger to the action purchasing at an execution sale is not affected by a subsequent reversal of the judgment); Reynolds v. Hosmer, 45 Cal. 616. The reason for the rule as applied to strangers, as the old authorities say, is that to hold otherwise would cause them to lose both the property they bought and the price. Another reason is, that a contrary rule would discourage bidding at judicial sales. Reynolds v. Harris, 14 Cal. 667, 681.

13. Barnhart v. Edwards, 128 Cal. 573, 61 Pac. 176; Polack v. Shafer, 46 Cal. 270; Reynolds v. Hosmer, 45 Cal. 616; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

14. Barnhart v. Edwards, 128 Cal. 573, 61 Pac. 176.

an execution sale has only a lien or equity and is not within the protection of the rule.[15] An assignee of the judgment stands in the same position as the plaintiff, and is not entitled to protection as a bona fide purchaser.[16] So, also, in case the plaintiff purchases the property and then conveys it to another pending appeal, the plaintiff's grantee is presumed to have knowledge of the character of the plaintiff's title, and cannot claim protection from making the restitution which the plaintiff would have been required to make.[17]

Where judgment is not reversed.—The reason of the rule does not apply where a judgment directing a sale of property to satisfy a lien is modified by merely reducing the amount of the lien, without changing that portion directing a sale of the property. In that event it cannot be said that the defendant has lost any property unless more of his property has been taken than the amount for which the judgment has been affirmed.[18]

§ 632. Proceedings to Obtain Restitution.—Restitution in the lower court may be had by motion in the proceeding, under its well-recognized authority to prevent or remedy an injurious and illegal execution of its process by its officers.[19] It has been suggested that the motion is unaffected by the statute of limitations.[20] The code pro-

15. Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

16. Reynolds v. Hosmer, 45 Cal. 616; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459 (an assignee of a judgment and of the sheriff's certificate of sale stands in the same position as his assignor, the plaintiff, and is not entitled to retain the property).

17. Di Nola v. Allison, 143 Cal. 106, 65 L. R. A. 419, 76 Pac. 976 (reviewing and distinguishing cases from other jurisdictions).

18. Barnhart v. Edwards, 128 Cal. 573, 61 Pac. 176; Hewitt v. Dean, 91 Cal. 617, 27 Am. St. Rep. 227, 28 Pac. 93.

19. Grant v. Oliver, 91 Cal. 158, 27 Pac. 596; Johnson v. Lamping, 34 Cal. 293; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

20. Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459. Compare Johnson v. Lamping, 34 Cal. 293, where the court said that by referring to the Reynolds case, it does not desire to be understood as committing itself to this proposition.

vides that a successful appellant entitled to restitution may have relief by action against the respondent for the proceeds of the sale after deducting the expenses thereof.[1] But the right to such relief existed before the statute.[2] The successful party upon an appeal may have the proceedings or sale vacated by an independent action in any court of competent jurisdiction.[3] If the respondent still has possession of the property in specie, the appellant may bring an action to have the sale under the judgment set aside and to be restored to possession.[4] If the character of the property is such as to make its seizure under a writ of replevin impossible, he may, by an equitable suit, compel delivery, or, if that cannot be had, compensation in money.[5] In a proper case, he may also have an action for damages as an alternative.[6] The remedy of a defendant in a judgment by action for damages is cumulative to that by motion. The fact that he made an abortive attempt by motion to have the sale set aside does not preclude from subsequently suing for damages.[7]

Parties and right to sue.—Tenants in common of property sold under a judgment which has been reversed may join in an action for damages, and if one be dead, his executor or administrator may be joined with the other tenants. If it was the assignee of the judgment who procured the issuance of the execution and sale of the property, the action is properly brought against him.[8] The mere passive presence of a defendant in execution at an

1. See supra, § 592.

2. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

3. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

4. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Joost v. Dore, 27 Cal. App. 729, 151 Pac. 29.

5. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624 (action for restitution of certificates of stock).

6. Cowdery v. London & S. F. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Reynolds v. Hosmer, 45 Cal. 616; Purser v. Cady, 5 Cal. Unrep. 707, 49 Pac. 180 (opinion in department); and see cases cited in note 12, infra, this section.

7. Reynolds v. Hosmer, 45 Cal. 616.

8. Reynolds v. Hosmer, 45 Cal. 616.

execution sale does not estop him from suing for restitution thereof after reversal of the judgment where he received no proceeds of the sale.[9]

Complaint.—It is not necessary in a complaint for damages to make a direct averment of the existence of the property, if that fact appears by necessary inference from the facts alleged.[10] Although there is no attempt in a pleading to comply with section 456 of the Code of Civil Procedure as to the manner of alleging the rendition of judgments, it is not necessary to show that the court reversing the judgment had jurisdiction to do so.[11]

Character and extent of liability.—On reversal of a judgment the extent of liability of a plaintiff in a judgment who obtained property of a defendant thereunder is that applicable to a trustee, the rule in such case being that he shall conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own. He is not chargeable with more than he received, nor liable for losses if he acted in good faith and with common skill, prudence and diligence.[12] But if he converts the property to his own use, he is liable for its value at the time of the conversion with interest.[13]

9. Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776, distinguishing Lay v. Neville, 25 Cal. 545, on the ground that in that case the owner of the property gave directions to the officer to sell it and afterwards received the proceeds of the sale. See Di Nola v. Allison, 143 Cal. 106, 65 L. R. A. 419, 76 Pac. 976, holding the question of estoppel to be one of fact.

10. Reynolds v. Hosmer, 45 Cal. 616. See Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624, holding a complaint for restitution of certificates of stock to be sufficient.

11. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

12. Ward v. Sherman, 155 Cal. 287, 100 Pac. 864 (cited in Asato v. Emirzian, 177 Cal. 493, 171 Pac. 90).

13. Asato v. Emirzian, 177 Cal. 493, 171 Pac. 90 (where the taking of orange trees in execution of a judgment afterward reversed was held to be a conversion); see Black v. Vermont Marble Co., 137 Cal. 684, 70 Pac. 776, holding the allowance of interest on the value of the property from the date of demand was proper.

VIII. JURISDICTION OF AND PROCEEDINGS IN APPELLATE COURT AFTER REMAND.

§ 633. Where Remittitur is Duly Issued.—While an appellate court has power to make any proper order in a case until its remittitur is duly issued,[14] its jurisdiction over the appeal ends when its mandate issues in regular course, or when it is regularly issued and filed in the court below. Thereafter, it cannot recall the case and reverse or modify its decision.[15] It cannot thereafter recall its remittitur,[16] or modify its judgment. The decision has become a finality beyond the power of the court to modify,[17] except as to the correction of clerical errors in the judgment readily corrected by the record.[18] It cannot be modified even upon a subsequent appeal from orders made pursuant to the remittitur of such appellate court, as the duty of the trial court in such case is merely to make such

14. Estate of Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742. See supra, § 593, as to vacation of judgment; Rowland v. Kreyenhagen, 24 Cal. 52 (until remittitur is issued and filed); Mateer v. Brown, 1 Cal. 231 (until remittitur is issued and filed).

15. Philbrook v. Newman, 148 Cal. 172, 82 Pac. 772; In re Wharton, 130 Cal. 486, 62 Pac. 741; Leese v. Clark, 20 Cal. 386; San Francisco Savings Union v. Long, 6 Cal. Unrep. 278, 56 Pac. 882. But see Romini v. Cralle, 80 Cal. 626, 22 Pac. 296, holding that the supreme court can modify an order dismissing an appeal to make it read "without prejudice," even though its remittitur has already issued. See supra, § 619.

16. Richardson v. Chicago P. & P. Co., 135 Cal. 311, 67 Pac. 769 (denying motion, made eight months after issuance of remittitur, to recall it upon the mere ground that one claimed to be an adverse party, whose judgment was paid by the appellant, was not served with notice of appeal); In re Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Sharon v. Sharon, 79 Cal. 633, 690, 22 Pac. 26, 131; People v. Sprague, 57 Cal. 147; Leese v. Clark, 20 Cal. 417.

17. Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816; Martin v. Wagner, 124 Cal. 204, 56 Pac. 1023.

18. Swain v. Naglee, 19 Cal. 127 (where upon an appeal from an order granting a new trial the court affirmed the "judgment" instead of the "order granting a new trial").

orders as may be necessary to cause its judgment to be enforced.[19]

§ 634. Where Remittitur is Irregularly Issued.—The foregoing rules are based upon the assumption that the remittitur was regularly issued. If the remittitur has been issued inadvertently, or if some fraud has been practiced upon the appellate court and the opposite party, the court is not divested of jurisdiction,[20] and it may recall its remittitur, and take such steps as may be necessary or proper in the circumstances.[1] This is not done upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree.[2]

Not only may an appellate court recall its remittitur in order that it may revoke or revise its judgment or order in a case where fraud or imposition has been practiced upon the court,[3] but it may also recall its remittitur for the purpose of correcting clerical errors or omissions in it and to

19. Sharon v. Sharon, 79 Cal. 633, 690, 22 Pac. 26, 131; Argenti v. San Francisco, 30 Cal. 458. See supra, §§ 585 to 569, as to review upon subsequent appeals.

20. Richardson v. Chicago P. & P. Co., 135 Cal. 311, 67 Pac. 769.

1. Estate of Treadwell, 111 Cal. 189, 43 Pac. 584 (refusing to recall remittitur for failure to serve notice of motion to dismiss the appeal, where the guardian acquiesced in the order annulling his letters and no showing was made of false suggestion or mistake of fact); In re Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Hanson v. McCue, 43 Cal. 178; Vance v. Pena, 36 Cal. 328; Rowland v. Kreyenhagen, 24 Cal. 52.

2. Martin v. Wagner, 124 Cal. 204, 56 Pac. 1023; Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008; Rowland v. Kreyenhagen, 24 Cal. 52.

3. Richardson v. Chicago P. & P. Co., 135 Cal. 311, 67 Pac. 769.

make it conform to the final judgment of the court.[4] For example, it will recall its remittitur if the clerk omits to insert therein a direction as to costs as required by rule XXIII of the supreme court,[5] or if he inserts such direction in a case not embraced by the rule,[6] or where by mistake the clerk enters an order denying, when in fact the order made granted, a rehearing.[7] A remittitur will be recalled which has issued prematurely,[8] or which was issued after the filing of a petition for rehearing,[9] or after the entry of an order granting a rehearing.[10] A petition for rehearing placed in the office of an express company addressed to the clerk in time to have reached him within the time allowed by law for filing is in contemplation of law in the hands of the clerk within the time limited by law. And though the petition be lost and fail to reach the clerk, the issuance of a remittitur is improper and will be recalled.[11] Also, it would be the plain duty of the appellate court to recall its remittitur if its judgment were void.[12] But it has been held that the pendency of an

4. Oakland v. Pacific Coast L. & M. Co., 172 Cal. 332, 156 Pac. 468 (this may be done at any time); Baker v. Southern Cal. Ry. Co., 130 Cal. 113, 62 Pac. 302. See San Francisco Sav. Union v. Long, 6 Cal. Unrep. 278, 56 Pac. 882, refusing to recall remittitur where it conformed to the judgment and it was too late to amend the judgment).

5. Estate of Prager, 167 Cal. 737, 151 Pac. 369; Baker v. Southern California Ry. Co., 130 Cal. 113, 62 Pac. 302; Morgrage v. National Bank, 25 Cal. App. 133, 142 Pac. 1124.

6. San Joaquin & K. R. C. & I. Co. v. Stevinson, 165 Cal. 540, 132 Pac. 1021.

7. Vance v. Pena, 36 Cal. 328.

8. Hogs Back Co. v. New Basil Co., 65 Cal. 22, 2 Pac. 489.

9. Hanson v. McCue, 43 Cal. 178; Grogan v. Ruckle, 1 Cal. 193.

10. Grogan v. Ruckle, 1 Cal. 193.

11. Bernal v. Wade, 46 Cal. 640; Hanson v. McCue, 43 Cal. 178. See De Baker v. Carillo, 52 Cal. 473, in which an application to recall a remittitur was made upon the ground that through excusable neglect of the person to whom it was transmitted to be filed with the clerk it was not filed in time. It was held unnecessary to determine whether this was a proper case for the recall of the remittitur as the petition for rehearing was without merit.

12. Martin v. Wagner, 124 Cal. 204, 56 Pac. 1023 (but holding a decision rendered against a party after his death is not void and that the remittitur will not be recalled).

oral motion to vacate the judgment, or the failure of the record to show the denial of the motion, does not affect the regularity of the remittitur and it will not be recalled.[13] And a motion to recall a remittitur is not a proper remedy for a litigant who is dissatisfied with the judgment of the appellate court,[14] or to reach errors of the lower court committed after the remittitur has gone down.[15]

Proceedings.—The grounds upon which a recall of a remittitur is desired should be stated in the notice of motion, but in the absence of a statute or rule of court, a notice will not be held insufficient for failing to state specifically the precise ground upon which it will be made, if the terms of the notice otherwise disclose the ground, and the opposite party is not prejudiced.[16] The moving party should not be guilty of laches,[17] as this of itself is a good ground for denying his application.[18]

P. LIABILITY UPON UNDERTAKING.

I. INTRODUCTORY.

§ 635. Liability Generally.—It is thoroughly settled that the sureties on an undertaking on appeal or to stay execution may stand upon the strict letter of their con-

13. Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710.

14. Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929. See supra, §§ 462, 593, as to remedies by rehearing and modification of judgment.

15. Dorland v. Bernal, 2 Cal. Unrep. 529, 7 Pac. 792.

16. Baker v. Southern Cal. Ry. Co., 130 Cal. 113, 62 Pac. 302.

17. Baker v. Southern California Ry. Co., 130 Cal. 113, 62 Pac. 302 (holding party not guilty of laches in delaying his motion until the Los Angeles term when the case belonged in that district); Douglass v. Fulda, 59 Cal. 285 (denying motion made more than a year since the rendition of the judgment, where the judgment has since been satisfied); San Francisco v. Calderwood, 58 Cal. 355 (denying motion made more than ten years after remittitur issued); Estate of Sanford, 7 Cal. Unrep. 159, 73 Pac. 466 (holding excuses for laches insufficient).

18. San Francisco v. Calderwood, 58 Cal. 355, 2 Cal. Unrep. 120.

tract. They can be held to no different contract from that into which they have entered.[19] For example, the sureties against waste on a particular piece of property cannot be held liable for waste on another parcel of property.[20] So, also, where an appeal is taken by one party, and the undertaking thereon purports to be given on an appeal by several appellants, it has been held that the sureties standing on the strict letter of their contract could never be liable for anything; since, as it is said, "there never was a joint appeal, there never could be an award of damages, or costs against the appellants."[1]

The obligation to pay the judgment resting on the sureties on an undertaking to stay execution on a money judgment is absolute and subsists until the judgment is actually paid. Any performance by the defendant that will discharge the judgment against him will operate as a discharge of the sureties, and any act of the plaintiff that will release the defendant from the judgment will also release them, but so long as the plaintiff has the right to enforce the judgment against the defendant, he is entitled to enforce their obligation. On the other hand, when the judgment has been revived against the defendant, under section 708 of the Code of Civil Procedure, after having been satisfied by the purchase of property under execution which belonged to a third party, and was recovered by such third party, the sureties are liable to pay the amount of such revived judgment, and a new judgment may be entered against them for such amount.[2]

19. Title Insurance & Trust Co. v. California Development Co., 168 Cal. 397, 143 Pac. 723; Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60; Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685; Estate of McDermott, 127 Cal. 450, 59 Pac. 783; Hibernia Savings & Loan Society v. Freese, 127 Cal. 70, 59 Pac. 769; Ogden v. Davis, 116 Cal. 32, 47 Pac. 772; McCallion v. Hibernia Sav. & Loan Society, 83 Cal. 571, 23 Pac. 798; Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731; McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912.

20. Ogden v. Davis, 116 Cal. 32, 47 Pac. 772.

1. Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685 (per Henshaw, J.).

2. Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627.

Conclusiveness of recitals in undertaking.—With some exceptions, the sureties are bound by the statements in their contract and cannot question the truth of its recitals.[3] By this rule the sureties in an action on an undertaking to stay execution of a judgment in ejectment are estopped from denying that the appellant was in possession of the premises at the time he gave the undertaking.[4]

§ 636. Performance or Breach of Condition.—Inasmuch as appeal bonds are conditioned to pay the judgment appealed from if affirmed, there is no liability thereon when the judgment appealed from is reversed with directions to enter a different judgment.[5] While the code now requires the undertakings on appeal in a generality of cases to provide for payment by the sureties both when the judgment is affirmed and when the appeal is dismissed, the Practice Act did not require a stipulation as to liability in the event the appeal was dismissed. Under this state of the law it was held that the affirmance which fixed the liability of the sureties contemplated any action of the appellate court by virtue of which the judgment or order was no longer open for review, whether that be by a dismissal of the appeal or by a direct decree of affirmance.[6] Therefore, it was held that there was such an affirmance as would charge the sureties, where the

3. Ogden v. Davis, 116 Cal. 32, 47 Pac. 772 (where an undertaking in a lump sum provides against waste and any deficiency arising on a foreclosure sale, the sureties cannot prove that the judge failed to fix an amount for deficiency); Fry v. Astorg, 29 Cal. App. 740, 156 Pac. 873 (holding this rule has no application where an appeal is taken by one person and the undertaking purports to be given on an appeal taken by several persons, as the surety in resisting an action is merely denying that the bond was given to secure the appeal of one. He is standing on the terms of his contract); Hammond v. United States F. & G. Co., 29 Cal. App. 464, 155 Pac. 1023.

4. Murdock v. Brooks, 38 Cal. 596 (whether an eviction subsequent to the execution of the undertaking may be shown, quaere).

5. Chase v. Reis, 10 Cal. 518; Chase v. Reis, 1 Cal. Unrep. 67.

6. Karth v. Light, 15 Cal. 324.

appeal was dismissed for want of prosecution,[7] or by the consent of the parties.[8]

Affirmance in part.—Inasmuch as an undertaking given under section 942 of the Code of Civil Procedure is required to be to the effect that the appellant will pay the amount directed to be paid "if the judgment or order appealed from or any part thereof be affirmed," it follows that the sureties are liable on their undertaking where the judgment is affirmed in part; as, for example, where a judgment against several persons jointly is reversed as to certain of the appellants and affirmed as to the remainder.[9] Section 945 does not, however, provide in terms for an affirmance in part. This omission is significant, and manifests the intention of the legislature that the sureties are not to be bound in case of a partial performance, but only in case the judgment is affirmed as rendered and entered in the court below.[10]

In replevin.—A failure, within a reasonable time after affirmance of a judgment in replevin and remittitur sent down, to deliver the property in suit, constitutes a breach of the stay undertaking, and the respondent's right of action is complete. He is not required to sue for a delivery of the property, and his right of action is not affected by a tender of the property made during trial.[11]

§ 637. Defenses in General.—The sureties cannot question the jurisdiction of the trial court to entertain the action, because the affirmance by the appellate court is conclusive upon the appellant as to the jurisdiction of the trial court as well as to other matters involved in the case,

7. Ellis v. Hull, 23 Cal. 160.

8. Chase v. Beraud, 29 Cal. 138. Cited in Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627. See supra, § 454.

9. Wood v. Orford, 56 Cal. 157.

10. Heinlen v. Beans, 2 Cal. Unrep. 719, 12 Pac. 169; Heinlen v. Beans, 71 Cal. 295, 112 Pac. 167; Crane v. Weymouth, 54 Cal. 476.

11. United States Film Co. v. United States F. & G. Co., 30 Cal. App. Dec. 480, 186 Pac. 364.

and is therefore conclusive upon the sureties also.[12] Hence, the rule that sureties cannot question the validity of a judgment of affirmance on the ground of jurisdiction or any other ground.[13] Where one of the plaintiffs in a suit dies before judgment, a judgment rendered nominally for or against him as representing his heirs or other successors being voidable only, not void, a stay bond following the judgment executed nominally to the deceased party with others but really to his executors is valid and enforceable.[14] The sureties on an undertaking to stay execution of a judgment in ejectment are not released from liability because the plaintiff pending the appeal sells a portion of the premises. The principle entitling a surety upon payment to an assignment of the securities of the principal obligor in the hands of the obligee is not applicable, as the land belongs to the plaintiff and is not held by him as security for the use and occupation.[15] Inasmuch as a tender, although refused, is equivalent to payment, it has been held that the sureties upon an undertaking on appeal are released from liability by tendering the amount for which they are bound.[16]

§ 638. Defects and Omissions in and Alteration of Undertaking.—When the party in whose favor an undertaking to stay execution is executed has had the benefit of the stay, the sureties cannot be heard to say that the undertaking is void because all the forms of the statute, through their omission, were not complied with.[17] For example, since the provisions as to the amount of a stay undertaking are merely directory, and while the adverse party may insist upon an undertaking in the amount

12. Murdock v. Brooks, 38 Cal. 596; Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075.

13. Hathaway v. Davis, 33 Cal. 161.

14. Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75.

15. De Castro v. Clarke, 29 Cal. 11. See SURETYSHIP.

16. Sharp v. Miller, 57 Cal. 415.

17. Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Murdock v. Brooks, 38 Cal. 596.

prescribed by the statute, he may waive any insufficiency therein. If he considers the appeal as regularly taken and takes no steps to enforce the judgment, the sureties are liable, though the amount specified therein is less than that prescribed by the statute.[18] So, also, the affidavit of justification of the sureties being for the benefit of the adverse party, defects or omissions therein may be waived by him, either expressly or impliedly, by failing to take advantage of the omission, and treating and accepting the undertaking as sufficient. When so waived, the undertaking is sufficient in an action upon it against the sureties.[19]

Alteration.—An alteration of the undertaking after its execution will discharge the sureties from all obligation thereon. And so it has been held that when an undertaking is executed before the rendition of judgment, an interlineation of the date of the judgment subsequent to its execution is such an alteration of the contract entered into by the sureties as to discharge them from liability.[20]

§ 639. **Want of Consideration.**—In an undertaking on appeal the sureties agree to be liable if the appeal is dismissed, and inasmuch as the respondent must be at some expense to have even a void appeal dismissed, it cannot be said that an undertaking on appeal is without consideration because the appeal it was given to secure was ineffectual.[1] This reasoning can have no application, however, to an undertaking required merely to secure a stay of proceedings during an appeal which has already been taken. If in the latter case the appeal should be ineffectual, the undertaking is without consideration, and no recovery can

18. Dore v. Covey, 13 Cal. 502.

19. Murdock v. Brooks, 32 Cal. 596 (where it did not appear whether the undertaking was accompanied by an affidavit of the sureties); Dore v. Covey, 13 Cal. 502 (where the affidavit of justification did not state the residence of the sureties).

20. Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176. See SURETYSHIP.

1. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64.

be had thereon against the sureties.[2] There can be no estoppel which precludes the sureties from raising the defense of want of consideration, whatever the terms of the instrument may be.[3]

Unnecessary bond.—It is only upon a statutory bond given pursuant to section 942 of the Code of Civil Procedure that judgment can be ordered against the sureties on motion.[4] If the judgment from which an appeal is taken is not such as calls for the giving of a bond to stay execution, aside from the ordinary three hundred dollar appeal bond, a bond filed for that purpose is without consideration, and judgment against the sureties cannot be ordered thereon on motion.[5] So, also, if a stay bond under section 942 is given in a case in which a bond under section 943 or 945 is required, the bond is without consideration and is unenforceable on motion.[6] The mere fact that the respondent because of such bond forbears the execution of his judgment does not make it valid as a statutory bond and authorize judgment against the sureties on motion. Such act can at most only constitute

2. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64 (where the appeal was prematurely taken). See Hathaway v. Davis, 33 Cal. 161, holding the sureties were precluded from urging that the appeal was not taken in time, as the undertaking had the effect of staying execution. The judgment in this case was affirmed, however, and it was held also that the affirmance was conclusive.

3. Estate of Kennedy, 129 Cal. 384, 62 Pac. 64.

4. Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070.

5. Halsted v. First Savings Bank, 173 Cal. 605, 160 Pac. 1075; Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070 (an appeal from an order for execution and from an order refusing to vacate such order); Reay v. Butler, 118 Cal. 113, 50 Pac. 375 (as the bond rests for its efficacy upon statute, the consent of the sureties to summary judgment against themselves is ineffectual where the bond is ineffectual); McCallion v. Hibernia Sav. & Loan Society, 98 Cal. 442, 33 Pac. 329; Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070; Powers v. Crane, 67 Cal. 65, 7 Pac. 135; Churchill v. More, 7 Cal. App. 767, 96 Pac. 108; Olsen v. W. H. Birch & Co., 1 Cal. App. 99, 81 Pac. 656; Estate of McGinn, 3 Cof. Prob. Dec. 127.

6. United States Fidelity & Guar. Co. v. More, 155 Cal. 415, 101 Pac. 302; Central Lumber & Mill Co. v. Center, 107 Cal. 193, 40 Pac. 334.

a consideration and make the undertaking valid as a common-law obligation.[7] A mere forbearance, however, to sell the property involved as perishable will not constitute a consideration and render the undertaking valid as a common-law obligation, as no stay bond would have the effect of staying a sale of perishable property. In other words, in such case the privilege sought is not in fact secured by the undertaking.[8]

II. ENFORCEMENT BY ACTION.

§ 640. In General.—Upon the breach of a condition of an undertaking on appeal or to stay execution, the respondent may enforce the liability of the sureties by an ordinary civil action, or, in the case of an undertaking given pursuant to section 942 of the Code of Civil Procedure, he may have judgment entered against the sureties upon motion.[9] The undertaking to stay execution and the undertaking upon appeal are distinct, and though both are included in one instrument, the fact that the respondent brings an action on the former does not preclude him later from suing upon the latter.[10] The undertaking is an express contract for the direct payment of money in the sense of the statute of limitations, and an attachment may be issued in such action where the grounds exist therefor.[11]

§ 641. Time to Sue.—The right of action upon an undertaking on appeal or to stay execution accrues upon the affirmance or dismissal of the judgment to which the action relates, and must be brought within the statutory period thereafter, or it will be barred by the statute of

7. Central L. & M. Co. v. Center, 107 Cal. 193, 40 Pac. 334; Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070.

8. Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070.

9. See infra, § 646.

10. Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075.

11. Hathaway v. Davis, 33 Cal. 161.

limitations. This rule applies as well to a cause of action upon an undertaking, given under section 945 of the Code of Civil Procedure, to pay the value of the use and occupation of property from the time of the appeal until delivery of possession. Such cause of action accrues upon the affirmance of the judgment, though the liability may continue until the appellant delivers possession of the premises.[12] Moreover, it is an action upon contract and is not one of trespass for mesne profits. It is not therefore within the rule that applies to actions not maintainable before possession is regained.[13] An action on an undertaking to perfect an appeal or stay execution should not be brought prematurely, however.[14] And an action thereon cannot be brought, so long as there is in force a supersedeas or an order staying execution on the judgment. To hold otherwise would be to regard the sureties less favorably than their principal.[15]

Prior to the amendment of sections 337 and 339 of the Code of Civil Procedure in 1917, the code distinguished between actions upon contracts "executed within the state" and upon those "executed out of the state" in respect to the time within which the action must be

12. Clark v. Smith, 66 Cal. 646, 4 Pac. 689, 6 Pac. 732 (an action upon an undertaking to pay the value of the use and occupation of the premises from the time of the appeal until the date of the affirmance is barred if not brought within four years after the affirmance); De Castro v. Clarke, 29 Cal. 11.

13. Crane v. Weymouth, 54 Cal. 476.

14. Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075 (construing undertaking to effectuate a stay pending an appeal from an order appointing an ancillary receiver, and holding an action to be premature which was brought prior to the time the judgment on the merits became final).

15. Sharon v. Sharon, 84 Cal. 433, 23 Pac. 1102; Parnell v. Hancock, 48 Cal. 452.

Under the rule that a stay on appeal from an order denying a new trial stays execution on the judgment, the sureties on a stay bond executed on an appeal from the judgment cannot be liable on their bond after the dismissal of the appeal, while a separate appeal from an order on new trial is pending which operates as a stay of execution on the judgment. Starr v. Kreuzberger, 131 Cal. 41.

brought. Under this state of the law, it was held that an undertaking was "executed" when filed with the clerk, and that therefore the place of filing determined whether the instrument was executed in or out of the state within the meaning of the statute.[16]

§ 642. **Conditions Precedent.**—An undertaking to stay execution of a judgment or order is an independent and absolute undertaking that if the judgment be affirmed or the appeal be dismissed the appellant will pay the judgment or do such other act as is therein stated. By its terms it precludes the idea that the judgment creditor must first exhaust his remedy under the judgment by execution before he can resort to his action on the undertaking. Neither the issuance of an execution and return unsatisfied[17] nor a demand on the principal for payment[18] is a condition precedent to an action upon a stay bond. If one of the sureties on an undertaking on appeal dies before suit, the respondent does not forfeit his right of action against the other sureties by failing to present his claim against the estate of the deceased surety.[19]

§ 643. **Parties.**—An action on an undertaking to stay execution of a judgment may be brought in the name of the judgment creditor in his own name. Though it is not expressly made payable to him, it should be treated as if so made payable. Where the action is continued and the judgment is rendered in his name, the action may be brought in his name, even though, pending the action, he had transferred his interest therein. In such case he sues as a trustee of an express trust for the benefit of his transferee.[20] An action upon an under-

16. Howard Ins. Co. v. Silverberg, 89 Fed. 168.

17. Parnell v. Hancock, 48 Cal. 452; Murdock v. Brooks, 38 Cal. 593; Tissot v. Darling, 9 Cal. 285.

18. Pieper v. Peers, 98 Cal. 42, 32 Pac. 700; Murdock v. Brooks, 38 Cal. 593.

19. Hathaway v. Davis, 33 Cal. 161.

20. Walsh v. Soule, 66 Cal. 443, 6 Pac. 82.

taking given on an appeal from an order appointing a receiver is properly brought by the plaintiff in the original action rather than by the receiver, as the undertaking runs to him.[1]

After assignment.—While an assignee of the judgment and of the undertaking may sue in his own name, it is not clear whether an assignee of the undertaking can recover without also alleging and proving an assignment of the judgment.[2] It has been held that the undertaking does not pass by the assignment of the judgment, because it is not a necessary incident to the judgment, and that the assignee cannot maintain an action upon the undertaking in his own name;[3] but, as pointed out in a later decision, the court in so holding evidently overlooked the real party in interest rule. Under the code provision requiring actions to be brought in the name of the real party in interest, an assignment of the judgment without an assignment of the undertaking on appeal, operates as an equitable assignment of the undertaking so as to entitle the assignee to sue thereon in his own name.[4] It is probable that the action may be brought by either party, the assignee suing as the real party in interest, the assignor as trustee of an express trust.

Joinder.—Where an action is brought by a husband and wife without objection to their joinder, and an under-

1. Borges v. Hillman, 29 Cal. App. 144, 154 Pac. 1075.

2. Murdock v. Brooks, 38 Cal. 596, where the court says: "The undertaking is a promise to pay a particular debt or obligation of another person and not to pay money generally, and whoever claims performance must, doubtless, show that the debt or obligation is due to him, and this he cannot do, if he is not the plaintiff in the judgment, unless he proves an assignment [of the judgment]."

3. Chilstrom v. Eppinger, 127 Cal. 326, 78 Am. St. Rep. 46, 59 Pac. 696; Moses v. Thorne, 6 Cal. 87.

4. Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180. See Hentig v. Johnson, 12 Cal. App. 423, 107 Pac. 582, in which the court says that it is unnecessary to decide whether Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180, overrules or merely distinguishes Chilstrom v. Eppinger, 127 Cal. 326, 78 Am. St. Rep. 46, 59 Pac. 696. See ASSIGNMENTS.

taking on appeal is executed to both of them, they may join in an action upon the undertaking.[5]

§ 644. Pleadings.—A complaint on an undertaking on appeal or to stay execution should conform to the general rules governing complaints in actions upon contract generally. It must plead the undertaking,[6] and allege its execution and filing,[7] the taking of the appeal, the disposition of the appeal, and breach of the undertaking. An allegation that the party "appealed to the superior court of said county and state from said judgment" is a sufficient averment of that fact. The "appeal" is the ultimate fact to be alleged. The several acts performed in taking it are but probative facts, and their allegation in the complaint would be obnoxious to the charge of alleging evidence instead of facts. An appeal is not in any sense a "judgment or other determination" within the meaning of section 456 of the Code of Civil Procedure. Hence, it is unnecessary to state that the appeal was "duly" taken.[8] And it has been held that an averment that the appeal was dismissed by the appellate court, even though defective, is cured by an allegation in the answer that the court made an order of dismissal, "which said judgment was duly made, duly rendered, and duly given."[9]

A complaint on an undertaking to stay execution of a money judgment need not allege that execution was issued upon the judgment against the appellant, as the non-payment of the judgment can be shown without the issuance of an execution.[10] Where a claim is made for

5. Tissot v. Darling, 9 Cal. 278.

6. Murdock v. Brooks, 38 Cal. 596 (undertaking may be pleaded according to its legal effect, or in haec verba). See PLEADING.

7. But a delivery need not be alleged, as a delivery is not required. Holmes v. Ohm, 23 Cal. 268.

8. Moffat v. Greenwalt, 90 Cal. 368, 24 Pac. 296. See JUDGMENTS; PLEADING.

9. Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296.

10. Pieper v. Peers, 98 Cal. 42, 32 Pac. 700; Murdock v. Brooks, 32 Cal. 596; Tissot v. Darling, 9 Cal. 278.

costs on appeal, it seems that as costs are not formally awarded as a rule but follow the judgment as a matter of course, it is unnecessary to make a specific allegation that costs were awarded. Such allegation would follow as a legal presumption from the allegation that the judgment was affirmed.[11] A complaint on a stay bond is not bad on demurrer because it omits to state that the undertaking was accompanied by an affidavit of sureties that they are worth double the sum specified therein.[12] And a complaint on a bond to stay execution of a judgment for sale or delivery of real property need not allege that the plaintiff in the judgment is entitled to the rents and profits, as this is determined by the judgment appealed from.[13]

The defendant must demur or answer in accordance with the general rules governing such pleadings.[14]

§ 645. Trial and Judgment.—The general rules governing the admissibility of evidence are applicable to an action upon an undertaking to perfect an appeal or stay execution.[15]

Amount of liability.—The undertaking of a surety to stay execution of a judgment of foreclosure is to the effect that "if the judgment be affirmed, he [the appellant] will pay the value of the use and occupation of the

11. Hathaway v. Davis, 33 Cal. 161.

12. Murdock v. Brooks, 38 Cal. 596. See supra, § 637.

13. Murdock v. Brooks, 38 Cal. 596.

14. De Castro v. Clarke, 29 Cal. 11 (in an action on an undertaking in an ejectment suit, an answer that pending the appeal the plaintiff conveyed a portion of the premises to one defendant and leased a portion to others does not state a complete defense. Construed most favorably, it alleges merely a transfer on the last day the appeal was pending. Moreover, it does not show the value of the use after the transfers). See PLEADING.

15. Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75 (evidence as to possession of premises by others is inadmissible where issue is not taken on an allegation that defendant is in possession. Nonpayment of the amount of the bond need not be proved where the allegation of nonpayment is not denied in the answer). See EVIDENCE.

property from the time of appeal until delivery of possession thereof." Where the judgment gives no right to the possession or rents and profits, the debtor may remain in possession without being accountable for rents or use and occupation, until a sale has been made, and the legislature cannot have intended to increase his liability in the case of an appeal, or to require an undertaking subjecting the sureties to a greater liability than that of the principal. Thus considered, the stipulation to pay the value of the use must refer to those cases in which the creditor is entitled to the value of the use. When he is not entitled thereto, the stipulation to pay it is not binding on the sureties.[16] Under an undertaking in a lump sum providing against waste and deficiency, no recovery can be had against the sureties for the deficiency if the penal sum fixed is consumed by a judgment against them for waste, but if no damage for waste is recovered, the full amount of the penal sum is available to make good any deficiency. If the deficiency exceeds that amount, the fact that the plaintiff asks judgment for the whole amount does not deprive him of his right to recover the sum named in the undertaking.[17]

Reimbursement of sureties.—"Whenever any surety on any undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmance by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce and satisfy such judgment, in all respects as if he had recovered the

16. Whitney v. Allen, 21 Cal. 233.

17. Ogden v. Davis, 116 Cal. 32, 47 Pac. 772. See Union Trust Co. v. Dickinson, 30 Cal. App. 91, 157 Pac. 615, whether an appellate court on affirming the judgment can authorize the entry of judgment against the sureties on an undertaking filed in such court, quaere. A district court of appeal cannot authorize such entry on an undertaking filed in the supreme court where there is no record in the district court of the proceedings culminating in the filing of the supersedeas bond.

same."[18] Provision is also made for sureties upon appeal bonds.[19]

III. ENFORCEMENT BY MOTION FOR JUDGMENT.

§ 646. In General.—The code requires that the undertaking to stay proceedings on a judgment or order directing the payment of money contain a stipulation that if the appellant does not make payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.[20] Recovery on any bond other than one covered by section 942 must be by action.

Nature of proceeding.—The entry of judgment against the surety upon a stay bond is not a special proceeding, but is in sequence of the judgment rendered therein against the appellant, in which action against the appellant the surety made itself a party to the original action and proceedings.[1]

§ 647. Constitutional Questions.—A statute allowing judgment on motion against the sureties who have subscribed an undertaking as required by the code is not unconstitutional.[2] It does not deprive a party of process without due process of law. By signing the undertaking, the sureties, in legal effect, make themselves parties to the action, and submit themselves to the jurisdiction of the court. Having voluntarily made themselves parties

18. Code Civ. Proc., § 1059; Estate of Hill, 67 Cal. 238, 7 Pac. 664 (until payment, the sureties have no enforceable demand against their principal). See SURETYSHIP.

19. Code Civ. Proc., § 709.

20. See supra, § 202.

1. See infra, § 649.

2. Ladd v. Parnell, 57 Cal. 232.

to the action and submitted themselves to the jurisdiction of the court, they also assent to and adopt all the provisions of law for the enforcement of the obligation incurred by their undertaking. They thereby waive any constitutional or statutory right in its enforcement to which they may otherwise be entitled, such as original process to make them parties to the action.[3]

§ 648. **When Liability Accrues.**—By the terms of their undertaking the sureties do not become liable to the respondent until the expiration of thirty days after the remittitur upon the affirmance of the judgment had been filed in the superior court. Any judgment entered prior to that time is premature and will be reversed on appeal.[4] And when a party appeals from a judgment and an order on motion for new trial, and his undertaking refers only to the judgment appealed from, the liability of the sureties upon the stay undertaking does not become fixed until the disposition of the appeal from the judgment. A disposition of the appeal from the order is not sufficient. If on an appeal from a judgment and an order on motion for new trial the clerk from inadvertence omits to send down a remittitur as to the appeal to which the undertaking relates, the sureties are not liable, as the omission of the clerk cannot take away their right to stand upon their contract.[5]

§ 649. **Proceedings.**—A proceeding to enforce an undertaking by motion is a statutory proceeding, and the course

3. Meredith v. Santa Clara Min. Assn., 60 Cal. 617.

4. Hawley v. Gray Bros. A. S. Pav. Co., 127 Cal. 560, 60 Pac. 437 (but the reversal of such premature judgment does not affect the obligation of the sureties on their undertaking); McCallion v. Hibernia Sav. & L. Soc., 83 Cal. 571, 23 Pac. 798 (holding that where an undertaking on appeal from an order denying a new trial refers to the remittitur on appeal from the judgment, the sureties are not liable until thirty days from the filing of a remittitur on the appeal from the judgment have elapsed).

5. McCallion v. Hibernia Sav. & Loan Society, 83 Cal. 571, 23 Pac. 798.

pointed out by statute must be strictly pursued.[6] The code authorizes the continuance of an action in the name of the original party after the transfer of his interest in the subject of action. Where the judgment, after affirmance and before remittitur, is assigned by the respondent to a third party without mentioning the appeal bond, the respondent may have judgment on the bond in his own name, and it will be presumed, in the absence of any showing to the contrary, that he is acting in behalf of the real party in interest.[7]

By signing the undertaking to stay execution pursuant to section 942 of the Code of Civil Procedure, the sureties consent that judgment should be rendered against them for the amount as to which the judgment appealed from should be affirmed.[8] And they waive notice thereof, so that no notice to them of the making of the motion for judgment is necessary.[9] This mode of procedure does not prejudice any rights of the parties, for if the judgment were in fact paid, though not satisfied of record, the sureties may have satisfaction entered and have the judgment vacated or annulled, and any execution that may have been issued recalled.[10] The records and files

6. Hansen v. Martin, 63 Cal. 282; Churchill v. More, 7 Cal. App. 767, 96 Pac. 108.

7. Hentig v. Johnson, 12 Cal. App. 423, 107 Pac. 582.

8. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019.

9. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019; Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627; Mowry v. Heney, 86 Cal. 471, 25 Pac. 17 (opinion in department, 3 Cal. Unrep. 277, 24 Pac. 301); Meredith v. Santa Clara Min. Co., 60 Cal. 617 (cited in Levy v. Magnolia Lodge, 110 Cal. 297, 42 Pac. 887). See Davis v. Heimbach, 75 Cal. 261, 17 Pac. 199, where the court says that it is deserving of consideration whether, in view of the importance of an opportunity to be heard, it ought not to be presumed that the parties contracted with reference to notice, and that it formed a part of their contract.

The contract of the surety is not that he "will pay" or "will be liable" if his principal fails, but that judgment may be entered against him, on motion, for the amount which has already been adjudicated to be due from his principal. This is an express waiver of further notice. Mowry v. Henry, 3 Cal. Unrep. 277, 24 Pac. 301. For opinion in bank, see 86 Cal. 475, 25 Pac. 17.

10. Meredith v. Santa Clara Min. Co., 60 Cal. 617.

in the case are before the court for the purposes of the motion. Formal introduction thereof in evidence is unnecessary.[11] The court has to decide only the question of law, whether or not, upon the facts appearing in these documents, the plaintiff is entitled to judgment against the surety.[12]

§ 650. Judgment.—The terms of the undertaking authorize the entry of judgment "against the undersigned sureties." Under such undertaking it is not permissible to render judgment against one of the sureties only, no reason appearing why the other is not joined, except that he cannot be bound and served with notice.[13]

"When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency."[14]

The decision of a motion for a judgment against a surety on an undertaking on appeal, cannot be re-examined by motion for a new trial.[15] But when the judgment against the sureties is satisfied, they are entitled to the same notice as the judgment debtor himself of proceedings to set aside the satisfaction or revive the judgment under section 708 of the Code of Civil Procedure. They are entitled to contest the facts upon which the petitioner relies to revive the judgment.[16]

11. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019. See EVIDENCE.
12. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019.
13. Hansen v. Martin, 63 Cal. 282.
14. Code Civ. Proc., § 942.
15. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019.
16. Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627.

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